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2 UNITED STATES BANKRUPTCY COURT

3 EASTERN DISTRICT OF NEW YORK

4 Case No. 12-46321-ess

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6 In the Matter of:

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8 EMMONS-SHEEPSHEAD BAY DEVELOPMENT LLC,

9

10 Debtor.

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12 - - - - -x

13

14 United States Bankruptcy Court

15 271 Cadman Plaza East

16 Brooklyn, New York

17

18 June 27, 2013

19 4:56 PM

20

21 B E F O R E:

22 HON. ELIZABETH S. STRONG

23 U.S. BANKRUPTCY JUDGE

24

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2 [3] Adjourned Status Conference

3 Adjourned from: 10/16/12 12/20/12 1/8/13 2/26/13 3/5/13 4/11/13

4 5/28/13

5

6 Confirmation Hearing

7

8 [61] Adjourned Motion to Object/Reclassify/Reduce/Expunge

9 Claims: Claim Number(s): 8 and 9 Filed by Arnold Mitchell

10 Greene on behalf of Emmons-Sheepshead Bay Development LLC

11 Adjourned from: 4/11/13 5/28/13

12

13 [62] Adjourned Motion to Object/Reclassify/Reduce/Expunge

14 Claims: Claim Number(s): 10 Filed by Arnold Mitchell Greene on

15 behalf of Emmons-Sheepshead Bay Development LLC

16 Adjourned from: 4/11/13 5/28/13

17

18 [50] Adjourned Motion for 2004 Examination of the Debtor,

19 Emmons Avenue LLC, Jacob Pinson and TD Bank, N.A. Filed by

20 Alla Kachan on behalf of Albert Dikman, Metropolitan Estates,

21 Inc., Albert Wilk.

22 Adjourned from: 4/2/13 4/11/13 5/28/13

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1 P R O C E E D I N G S

2 THE CLERK: Numbers 101 to 106 on the calendar, all  
3 matters regarding Emmons-Sheepshead Bay Development; parties in  
4 the courtroom and on the telephone.

5 THE COURT: All right, come on up.

6 MS. SCHWARTZ: Good afternoon, Judge. Lori Schwartz,  
7 Robinson Brog for the debtor.

8 MS. KACHAN: Good afternoon, Your Honor. Alla Kachan  
9 on behalf of Metropolitan.

10 THE COURT: All right. Thank you.

11 MR. FEUERSTEIN: Good afternoon, Your Honor. Jerold  
12 Feuerstein on behalf of the secured creditor SDF17 Emmmons LLC.

13 THE COURT: All right.

14 MS. MARTIN: Marylou Martin representing the United  
15 States Trustee.

16 THE COURT: Thank you.

17 MR. SHORE: On the phone, Your Honor. Richard Shore  
18 of Ganfer & Shore representing Breakers at Sheepshead Bay  
19 Condominium.

20 THE COURT: Thank you, we hear you loud and clear.  
21 Especially loud, which is good.

22 All right, the day is long, the hour is late, let me  
23 hear from debtor's counsel.

24 MS. SCHWARTZ: Good afternoon, Judge.

25 Judge we have a number of matters on today's calendar,

1 most importantly is the debtor's confirmation hearing.

2 THE COURT: Yes.

3 MS. SCHWARTZ: This has become an urgent matter at  
4 this point. At 3:30 this afternoon we were notified by a  
5 representative of the secured creditor that without  
6 confirmation of the plan that is on file today as-is, they're  
7 going to withdraw their funding, they're going to withdraw  
8 their support and they're going to pursue whatever remedies are  
9 available, whether that be proceeding in a state court for  
10 which stay has already been lifted, or filing a creditors'  
11 plan.

12 THE COURT: The matter's on the calendar today and  
13 we're ready to proceed today, so I appreciate the urgency that  
14 everyone feels. It is not second, or it could only be second,  
15 I suppose, to the Court's own desire to move things along as  
16 promptly as possible. I will just note in a general way that  
17 the -- you -- here in this judicial forum, the idea that a  
18 party might consider or suggest that it would set an arbitrary  
19 time limit on when a Court must decide something by, would seem  
20 to me inappropriately usurping the prerogative of the Court, to  
21 manage a long calendar and pay appropriate respect to each and  
22 all of the matters and parties before it, so I'm grateful that  
23 nothing like that has been invoked. Let's proceed.

24 MS. SCHWARTZ: Okay, Judge. We hear you loud and  
25 clear.

1 THE COURT: Thank you.

2 MS. SCHWARTZ: Judge, obviously, the parties have been  
3 working to try to reach a resolution -- when I say the parties,  
4 I mean the debtor and Metropolitan, who's the creditor who's  
5 taken a pretty active role in objecting to the various  
6 scenarios that have been proposed in the debtor's various  
7 plans. Those settlement negotiations have just broken down to  
8 a point where they're not -- it's not feasible to resurrect  
9 them, and we are prepared at this juncture to go forward with  
10 confirmation.

11 The objection deadline with respect to the plan and  
12 the ballots was June 20th. In response to that objection  
13 deadline, we did not receive any objections. We received  
14 several ballots. Both voting classes did vote to accept the  
15 plan, and we have filed a ballot certification as well as an  
16 affirmation in support of confirmation that was filed on  
17 Monday, June 24th. The Court may have seen that last evening  
18 the Metropolitan Group did file a ballot, also filed an  
19 objection to confirmation and a motion to compel with respect  
20 to discovery, which is a somewhat unrelated matter having to do  
21 with the pending claims objections.

22 Judge, it's the debtor's position that those  
23 objections are not timely, the ballot is not timely, and  
24 frankly, that they shouldn't be considered at this juncture.  
25 Metropolitan has been actively engaged and is aware of all of



1 the deadlines. The debtor has complied with the deadlines set  
2 forth by this Court. And we don't feel that the debtor should  
3 be penalized for doing what it's supposed to be doing in trying  
4 to move the case along.

5 I would further suggest, Judge that the confirmation  
6 objection that was filed by Ms. Kachan does not set forth  
7 anything new, anything different, from the prior objection she  
8 filed to the disclosure statement which was overruled at the  
9 time the disclosure statement was approved. It also contains  
10 statements that really are a misreading of the debtor's plan  
11 with respect to post-confirmation management of the debtor, as  
12 well as with respect to the feasibility of the plan.

13 THE COURT: All right. Staying for the moment with  
14 status, but understanding that confirmation is central to  
15 status, would anyone else like to be heard on the status?

16 MS. KACHAN: Yes, Your Honor.

17 THE COURT: Ms. Martin, may I hear from you first? I  
18 always like to hear from the Office of the United States  
19 Trustee, Ms. Kachan; I know you'll appreciate that.

20 MS. MARTIN: Your Honor, the only matter we consider  
21 of importance with regard to status is the debtor currently  
22 owes 1,300 dollars in quarterly fees, we've made requests. We  
23 have been advised today that the money is currently being held,  
24 and perhaps Ms. Schwartz can advise the Court of what she  
25 advised me this morning.

1 MS. SCHWARTZ: The money for Trustee fees is going to  
2 be advanced by the secured creditor with respect to the other  
3 monies they're advancing in support of the plan. That includes  
4 the unsecured creditors' funds and the payment to the other  
5 required effective date payments pursuant to the plan, the  
6 secured tax claims, administrative fees, United States Trustee  
7 fees, and the unsecured creditors' fund.

8 THE COURT: Okay. All right, Ms. Kachan.

9 MS. KACHAN: Yes.

10 Your Honor, with regard to confirmation and with  
11 regard to deadlines, as Your Honor knows --

12 THE COURT: Just speak on status at first, and  
13 anything beyond confirmation as to status.

14 MS. KACHAN: Nothing beyond confirmation and --

15 THE COURT: All right, then please proceed.

16 MS. KACHAN: -- and discovery.

17 THE COURT: All right, well, let's -- perhaps then it  
18 makes sense then to turn to the question of confirmation.  
19 Let's go back to the debtor. I invite you to review the  
20 elements of confirmation. I take it that you're prepared to  
21 proceed today, and the Court is prepared to proceed as well.

22 MS. SCHWARTZ: Thank you, Judge.

23 Judge, the debtor has filed a ballot certification and  
24 an affirmation of its principal, Jacob Pinson, who is the  
25 principal of Yachad Enterprises, that is the managing member of

1 the debtor. Mr. Pinson is in the courtroom today. The  
2 document numbers I am referring to for the ballot certification  
3 is document number 108 and for the confirmation affirmation is  
4 document number 109. We would request that those documents be  
5 admitted into evidence and we be authorized to rely on both of  
6 those documents in support of confirmation.

7 THE COURT: Any objection to the reliance upon those  
8 documents?

9 MS. KACHAN: No, Your Honor.

10 THE COURT: No response, please proceed.

11 (Ballot certification was hereby received into evidence as  
12 Debtor's Exhibit, as of this date.)

13 (Confirmation affirmation was hereby received into evidence as  
14 Debtor's Exhibit, as of this date.)

15 MS. SCHWARTZ: Judge, as set forth in the ballot  
16 certification the plan has been accepted by the Class 3  
17 impaired secured creditor SDF17 as well as the Class 4  
18 unsecured creditor class. As set forth in the confirmation  
19 affirmation, pursuant to an order entered on April 13th, 2013,  
20 this Court approved the debtor's second amended disclosure  
21 statement. Pursuant to that disclosure statement order we  
22 served the plan, the disclosure statement, scheduling order and  
23 the appropriate ballot or notification of nonvoting status on  
24 all parties, and filed an affidavit of service which was filed  
25 on the electronic docket of this case, reflecting that service

1 was made in a timely manner.

2 The disclosure statement order set June 20th, 2013 as  
3 the last date for the submission of ballots to vote to accept  
4 or reject the plan and for the filing of objections to the plan  
5 and scheduled the confirmation hearing for today. No timely  
6 objections were received.

7 Judge, the plan is the votes --

8 MS. KACHAN: Objection, Your Honor.

9 MS. SCHWARTZ: -- provides for payments of the New  
10 York City secured tax claims, administrative claims, including  
11 U.S. Trustee claims, and a funding of 100,000-dollar unsecured  
12 creditor fund for pro-rata distribution to holders of allowed  
13 unsecured claims. All of these amounts are being funded by the  
14 debtor's secured creditor SDF17. Any further plan payments,  
15 which is with respect to a waterfall where additional funds may  
16 be contributed to the unsecured creditor fund, is based upon  
17 sale thresholds of the condominium units at the property.

18 Judge, with respect to the plan that is on file, we do  
19 submit that it is in the best of the interests of the debtor  
20 and its estate and creditors. As I said before it provides for  
21 payment of a substantial amount of claims; it also provides for  
22 the secured creditor to continue funding the construction at  
23 the property to repair it from the damage that it suffered as a  
24 result of Hurricane Sandy, which inures to the benefit of the  
25 condominium, as well as to the residents of the condominium,

1 who have been living through this process, and provides the  
2 guaranteed fund of 100,000 dollars to the unsecured creditors.

3 Judge, with respect to the impaired Class 5 equity  
4 holders, as set forth in the plan, equity is going to be  
5 extinguished and is deemed to have rejected the plan. Post  
6 confirmation, the management of the debtor will be in the hands  
7 of Jeffery Schwartz, who is the Court-retained real estate  
8 counsel to the debtor. He'll be the plan administrator going  
9 forward. The issue with respect to post-confirmation  
10 management, which was set forth in the objection that was filed  
11 by the Metropolitan claimants indicates that Jacob Pinson will  
12 have some form of managerial role, but that is an incorrect  
13 reading of the documents. The plan is quite clear that post  
14 confirmation management is in the hands of Mr. Schwartz. With  
15 respect to the consulting agreement that Mr. Pinson is to  
16 become a party to with respect to going-forward sales, that  
17 consulting agreement, which was filed with the disclosure  
18 statement, is very clear, that he has no binding authority with  
19 respect to managerial issues; that he is there simply to  
20 consult and assist with going-forward marketing and sales at  
21 the property.

22 Judge, as set forth in the confirmation affirmation,  
23 the debtor submits the plan complies with the applicable  
24 requirements of the Bankruptcy Code including the provisions of  
25 Sections 1122, 1123 and 1129 of the Bankruptcy Code. Barring

1 any questions from Your Honor or from other parties present we  
2 would request that plan be confirmed based upon the record of  
3 the hearing, the confirmation affirmation and the ballot  
4 certification.

5 THE COURT: All right, let me hear from other  
6 proponents of confirmation.

7 MR. FEUERSTEIN: Your Honor, the secured creditor -- I  
8 do have to make this disclosure to the Court. There was no  
9 intention of putting pressure on the Court, or usurping the  
10 Court's authority. The situation is, is that our client went  
11 to the property yesterday, went to the property today, and  
12 there's some significant flooding and new issues with respect  
13 to the property. As a result thereof, our client had to report  
14 back to its investors, and its investors said, we don't know if  
15 we want -- we are concerned about funding this plan and we're  
16 concerned about moving forward. Our client's investors came  
17 back and said to our client, if the plan is not confirmed by 5  
18 o'clock today, then therefore we have no interest in funding  
19 this plan, no interest in putting more money into this, and  
20 we'll just continue with foreclosure. As it stands now, the  
21 plan is not confirmed by five, I would have to call my client,  
22 at this point in time, if the Court would confirm, to see if my  
23 client is still interested in funding the plan.

24 I mean, as far as the plan is concerned, assuming our  
25 client agrees to it, I mean, I wrote this speech before I spoke

1 with -- before my client came back to me at 3:30, the plan is  
2 fair, reasonable, and equitable; it is to the benefit of all  
3 creditors. A very important component of the plan is the fact  
4 that it will allow this condominium to survive, and therefore  
5 it's equitable, because our client will complete the  
6 renovations, enable the sale of units, and the sale of those  
7 units will certainly help the condo which is a creditor in this  
8 particular case. And the condo, as far as I know is a  
9 proponent of the plan.

10 If our client is forced to foreclose, there'll be no  
11 more fun -- there's potentially no more funding of condo fees,  
12 there's no more funding potentially of construction, and as a  
13 result the plan is certainly in the best interests of all  
14 parties, just in the best interests in general, and also  
15 satisfying the best interest test, because if our clients do  
16 foreclose, the unsecured creditors will get nothing. But as I  
17 said, I suppose we can continue and get the Court, and I'm  
18 going to have to go back to my client and say, well, it's after  
19 5 o'clock, can you speak to your investors?

20 THE COURT: Did they specify a time zone? We did  
21 begin the hearing as fast as we could, as we've begun every  
22 hearing today as fast as we could --

23 MR. FEUERSTEIN: I understand, Your Honor. But in no  
24 way --

25 THE COURT: -- and it was before five.

1 MR. FEUERSTEIN: Right. No, I realize that, Your  
2 Honor.

3 THE COURT: It was before five.

4 MR. FEUERSTEIN: As I said --

5 THE COURT: We've done the best we can.

6 MR. FEUERSTEIN: -- no disrespect for the Court,  
7 its -- I have invest -- my client has investors and needs to  
8 abide by the wishes of its investors.

9 THE COURT: Understood. People also need to follow  
10 Court orders. All right.

11 All right, thank you for that. I take it that subject  
12 to the -- that your most recent confirmed direction from your  
13 client is that your client supports the plan, including your  
14 client's role in the plan, subject perhaps to a need to  
15 confirm -- let me pick a different verb -- to communicate with  
16 your client to be sure nothing has changed. But I would trust  
17 that would be the case. All right.

18 And would anyone else like to be heard in favor of  
19 confirmation? What is that sound?

20 MR. SHORE: Yes, Your Honor --

21 THE COURT: Oh just what we need.

22 MR. SHORE: -- again this is Richard Shore, counsel to  
23 the Breakers condominium --

24 THE COURT: Excuse me, we have --

25 MR. SHORE: Can you hear me okay?



1 THE COURT: No we cannot, we must ask you to --

2 MR. SHORE: Can you hear me now?

3 THE COURT: No, one moment please. Please stand by.  
4 We're going to go off the record.

5 (Recess from 5:10 p.m. until 6:37 p.m.)

6 THE COURT: Good afternoon, please be seated.

7 THE CLERK: Third call Emmons-Sheepshead Bay.

8 THE COURT: All right, let's hear from debtor's  
9 counsel.

10 MS. SCHWARTZ: Thank you, Judge. And thank you for  
11 indulging what I know has turned into a very late evening.

12 After a lot of phone calls in the hallway, we have  
13 reached a resolution, and Mr. Feuerstein I hope will confirm  
14 what I'm putting on the record.

15 THE COURT: Okay.

16 MS. SCHWARTZ: This is going to be a -- an agreement  
17 by the secured creditor to fund the plan to the extent we are  
18 able to confirm the case today with a modification to the plan  
19 that we don't believe is a modification that requires any re-  
20 solicitation or anything in that matter, in fact we believe it  
21 actually goes to something that Ms. Kachan had raised in her  
22 objection.

23 The change is at the plan at section 5.1 with respect  
24 to the secured creditor's treatment --

25 THE COURT: Um-hum.

1 MS. SCHWARTZ: -- Class 3 SDF17 Emmons' secured claim,  
2 and that is that the consulting agreement that was to go into  
3 effect on the effective date is no longer going to be in play.  
4 That's going to be removed entirely so that Mr. Pinson will no  
5 longer be acting as a consultant and will no longer be entitled  
6 to those fees.

7 THE COURT: Okay.

8 MS. SCHWARTZ: In addition, in the event SDF receives  
9 net sale proceeds of no less than twenty-two million dollars --  
10 that's a change from twenty-three-and-a-half million dollars,  
11 they will release Mr. Pinson's personal guarantee of the loan  
12 and the mortgage on his residence.

13 THE COURT: Okay.

14 MS. SCHWARTZ: So while he's giving up the 240,000 in  
15 consulting fees, they've agreed to reduce the threshold with  
16 respect to the release of the guarantee and mortgage on his  
17 personal residence.

18 THE COURT: All right. All right, thank you. It  
19 sounds like you were able to be quite productive with the time,  
20 and I am grateful for your efforts. Shall we pick back up with  
21 confirmation?

22 MS. SCHWARTZ: Judge, I believe the debtor had  
23 completed its presentation with respect to confirmation.

24 THE COURT: Okay.

25 MS. SCHWARTZ: And the Trustee had --

1 THE COURT: And then I had asked to hear from other  
2 proponents of confirmation, and then the fire drill test  
3 occurred. Right. Right. And we have our telephonic  
4 participant back online, is that right?

5 MR. SHORE: Yes, Your Honor.

6 THE COURT: Okay, all right.

7 May I hear from the proponents of confirmation in  
8 addition to the debtor, would you like to confirm what's been  
9 stated Mr. Feuerstein?

10 MR. FEUERSTEIN: Yes, Your Honor, I'd like to confirm  
11 exactly what Ms. Schwartz said. The secured creditor will  
12 agree -- I'm going to give you some background as to why it  
13 happened.

14 THE COURT: Okay.

15 MR. FEUERSTEIN: I disclosed to the Court before that  
16 over -- I'm sorry -- that over the last twenty-four hours or so  
17 it came to light that there were significant additional  
18 remediation necessary at the property. As you know, this  
19 property was ravaged by Hurricane Sandy; and every day, it  
20 seems like there's a new plug to hole -- a hole to plug at this  
21 property. So as a result thereof, our client became concerned  
22 about putting additional dollars into the property. So the  
23 resolution in order to get it done was to get rid of the  
24 consulting fee, which saved at least a portion of the  
25 additional remediation costs. Otherwise, the secured creditor,

1 also subject to -- and also the additional consideration for  
2 that to the principal of the debtor is a lower release price  
3 for the mortgage on his personal residence and the guarantee in  
4 connection with that.

5 THE COURT: It seems like a sensible balance of  
6 adjustments on both sides.

7 MR. FEUERSTEIN: Right. So as a result, for the  
8 arguments that I made before, the secured creditor supports  
9 confirmation of the plan, subject to the revisions as stated on  
10 the record.

11 THE COURT: All right. Any other proponents of  
12 confirmation?

13 All right, opponents of confirmation?

14 MR. SHORE: Your Honor?

15 THE COURT: On the phone.

16 MR. SHORE: Can you hear me?

17 THE COURT: Yes.

18 MR. SHORE: We support -- the condominium supports the  
19 confirmation of the plan as well. As we mentioned there are  
20 real issues with respect to the property, and my clients are  
21 the ones who -- we've been through this process. These are  
22 working-class families. They -- this is their home. Our  
23 estimate (indiscernible) the common charges for this year  
24 alone. And without the (indiscernible) I understood the client  
25 (indiscernible) their continuing to accrue debt on a

1 (indiscernible). It would particularly be the case. And we  
2 support the (indiscernible) and (indiscernible) if possible,  
3 the units (indiscernible) the condominium (indiscernible) the  
4 budget.

5 THE COURT: All right, the connection is a bit  
6 imperfect but I take it that in substance, your clients, who  
7 are perhaps most directly affected day in, day out by all these  
8 proceedings, as the residents, support confirmation for the  
9 reasons that have previously been indicated by yourself on  
10 their behalf on the record and as you also note now. Is that a  
11 fair summary?

12 MR. SHORE: That is certainly fair, Your Honor.

13 THE COURT: Okay, all right. Ms. Kachan, over to you.  
14 Thank you very much.

15 MS. KACHAN: Good afternoon, or good evening, Your  
16 Honor.

17 THE COURT: Good evening.

18 MS. KACHAN: I don't know already which one. Your  
19 Honor --

20 THE COURT: Well, let me restate, I'd like to hear  
21 from anyone who opposes confirmation and then I'll go through  
22 and review the record. Of course support and opposition is  
23 part of the picture, but the Court's determinations will be  
24 controlling.

25 MS. KACHAN: Your Honor, this has been a long road. I

1 do posit that it is my client's position that we are not at all  
2 ready, notwithstanding, and we appreciate the immediacy put  
3 forth by the debtor and the secured creditor, but we do  
4 question the validity of that immediacy, but more importantly  
5 we feel that because the plan, according to many factors that I  
6 will discuss today was not, has not been proposed in good  
7 faith, the plan, and it cannot be confirmed today.

8 THE COURT: So your objection is specifically with  
9 respect to whether the debtor can satisfy 1129(a)(3) that the  
10 plan must be --

11 MS. KACHAN: Yes.

12 THE COURT: -- proposed in good faith and not by any  
13 means forbidden by law.

14 MS. KACHAN: Yes, Your Honor and --

15 THE COURT: All right, please proceed.

16 MS. KACHAN: -- in furtherance of that, when we  
17 started this process we had requested 2004 party and nonparty  
18 examinations and production of documents. We didn't get very  
19 far at all in the discovery process. We got very, very  
20 deficient -- as seen in my motion to compel -- responses from  
21 the debtor. And I think even more crucial, and something that  
22 Ms. Schwartz omitted today when she spoke of my opposition was  
23 that -- and something very new to my opposition that wasn't  
24 there before, was a factor that only came to light recently as  
25 we were beginning the process of discovery; there has been

1 documents that came to light, that there was at least one  
2 closing that we know of for sure which we have checks and  
3 evidence of, there was money taken, what's called under the  
4 table, meaning that the amount indicated in the contract and  
5 the amount that was actually paid were different. And that is  
6 indicated by the checks that were -- once my clients discovered  
7 it, that were later additionally paid to my client, and of  
8 course, also admitted to my clients. But --

9 THE COURT: All right --

10 MS. KACHAN: But the checks indicate --

11 THE COURT: -- did you put in any evidence --

12 MS. KACHAN: -- we have --

13 THE COURT: --of that? Ms. Kachan?

14 MS. KACHAN: -- we have actually sent -- yes, we have  
15 actually sent a request, an additional --

16 THE COURT: I asked you a very precise question. I  
17 see no -- I have your objection, but I have no affidavits. Do  
18 you have any evidence of --

19 MS. KACHAN: Your Honor, the additional documents --

20 THE COURT: -- assuming it relates to good faith.

21 MS. KACHAN: Yes. The additional document requests,  
22 together with these checks were sent over to Ms. Schwartz, we  
23 never received a response.

24 THE COURT: That's still not responsive to my -- so  
25 you have no evidence.

1 MS. KACHAN: We do have the checks. We did not attach  
2 them to the opposition; we do have them. And we did submit  
3 them to debtor's counsel, as a request for further production  
4 of documents and contracts and did not get -- receive a  
5 response to that. As we were --

6 THE COURT: I invite you to put on your evidence with  
7 respect to the absence of good faith. Do you have a witness?

8 MS. KACHAN: We have the checks. We have -- and I can  
9 propose my clients as witnesses because they were the ones who  
10 received the additional compensation in response to the demand  
11 that they made of why this went on. They were paid additional  
12 checks. We have the copies of those checks; we have the  
13 closing statement. We do not have the contract, as it was not  
14 produced by debtor's counsel.

15 THE COURT: So your position is that your clients  
16 received or paid --

17 MS. KACHAN: No, no. What I'm saying --

18 THE COURT: -- money under the table --

19 MS. KACHAN: -- is there was a closing --

20 THE COURT: -- to use your phrase.

21 MS. KACHAN: -- of title for one of the apartments.

22 The price on the closing sheet, on the deal sheet, was, I  
23 believe something like 900,000 dollars. The true --

24 THE COURT: Ms. Kachan, it's not necessary or  
25 appropriate for you to testify.



1 MS. KACHAN: Your Honor --

2 THE COURT: All right?

3 MS. KACHAN: You had asked me

4 THE COURT: Yes.

5 MS. KACHAN: I am stating what I know.

6 THE COURT: So here's my question, you've indicated  
7 that you can test one element of confirmation, which is whether  
8 this is -- the plan --

9 MS. KACHAN: Good faith.

10 THE COURT: -- has been proposed in good faith.

11 MS. KACHAN: Yes.

12 THE COURT: You've indicated, and I'll -- you'll need  
13 to help me connect the dots here, but the question of good  
14 faith or not is informed by whether payments in connection with  
15 a sale were made directly or indirectly in the amount reflected  
16 in the contract. And I don't yet see the connection  
17 necessarily between that and whether this Chapter 11 plan is  
18 proposed in good faith. And you've indicated that you have  
19 witnesses in the form of your clients who are prepared to  
20 testify --

21 MS. KACHAN: Yes.

22 THE COURT: -- to that effect. And I'll ask you to  
23 make a proffer as to what their testimony -- first of all, who  
24 the witness is, and what his testimony would be.

25 MS. KACHAN: Okay. The witness would be Alexander

1 Dikman --

2 THE COURT: Yes.

3 MS. KACHAN: -- and the testimony would be to the best  
4 of my knowledge that when the question was posed to Mr. Pinson  
5 of why the original amount contracted for and the amount on the  
6 deal sheet and the amount supposedly cleared from the closing  
7 statement paid at the closing, why they differed. They were  
8 told, okay yes, there was really 300 or whatever, more paid  
9 than, really paid at the closing, that was paid on paper --

10 THE COURT: But your client --

11 MS. KACHAN: -- than appears from the closing  
12 statement. And we -- and since they were being paid brokerage  
13 fees from those amounts, they were told we will pay you that  
14 additional brokerage fee off of that amount, and we have the  
15 checks to evidence that. But that is only one closing that we  
16 actually learned about.

17 MR. FEUERSTEIN: Your Honor --

18 THE COURT: And just to be clear, Mr. Dikman will  
19 testify as to what a person not in court -- as to the statement  
20 of another person, a person not present, said asking the Court  
21 to rely on the truth of the matter asserted?

22 MS. KACHAN: Actually this is Mr. Benten (ph.) who is  
23 the principal and who is present, but we are talking that we do  
24 have checks, copies of checks, evidencing these additional  
25 payments.

1 THE COURT: How does this connect to whether or not  
2 the debtor's plan is proposed in good faith?

3 MS. KACHAN: Your Honor, we initially asked for  
4 discovery because my clients felt --

5 THE COURT: Stay with my question, Ms. Kachan.

6 MS. KACHAN: I am explaining that monies were being  
7 siphoned from closings. This just shows one example of how  
8 monies were siphoned from closings.

9 THE COURT: How did the --

10 MS. KACHAN: Because they -- my clients learned of  
11 this one instance. They just don't have evidence of further  
12 instances, but they do know but they don't have the checks to  
13 evidence it. They do have the checks to evidence this one  
14 instance. And what I -- and what we were asking for discovery  
15 for, and the reason that we asked that the debtor produce  
16 financial statements clos -- complete closing statements. And  
17 this is not the only factor, Your Honor. There are several  
18 others that I will explain that we also have learned about.

19 THE COURT: You need to explain them --

20 MS. KACHAN: Okay.

21 THE COURT: -- as efficiently as possible --

22 MS. KACHAN: Okay.

23 THE COURT: -- in view of the hour and the fact that  
24 we're going to conclude the hearing today.

25 MS. KACHAN: Okay. Well, another question was, and

1 the reason that we asked for discovery, and the reason that we  
2 asked for the closing statements, for all the debtor's  
3 financials during the course of the closings to be produced, is  
4 because we're also aware that there was a construction company  
5 that was being paid out of every closing. There -- the  
6 principal of the construction company was present. None of  
7 these payments were reflected in any of the closing statements.  
8 That is the second instance.

9 My clients have asked why when there were sales of  
10 about twenty million dollars the secured claim had come to  
11 thirty-three million dollars. We had asked, again, for  
12 nonparty discovery of the bank. In our initial discovery  
13 request we said that we were seeking to understand how these  
14 amounts were arrived at. We were seeking to understand where  
15 the monies from closings went and how they were distributed and  
16 were they distributed in good faith, where did it -- was there  
17 any fraudulent dealings in these monies being distributed? And  
18 we actually do have evidence now that they were possibly  
19 fraudulent dealings.

20 We have not received any discovery with respect to any  
21 of this, and this is what we were seeking. In order to confirm  
22 this plan today, we need to understand if this plan was indeed  
23 filed in good faith. And it is our position, Your Honor, that  
24 we could not go forth with voting on a ballot when we were not  
25 fully informed on whether this plan was filed in good faith and

1 whether this plan really can be confirmed, and --

2 THE COURT: All right, well I have a sense --

3 MS. KACHAN: -- under the circumstances.

4 THE COURT: -- I think I have a sense of your  
5 objection. And it's also very helpful for the Court to  
6 understand that there's only one element of confirmation as to  
7 which you have an objection. I'd like to run through -- I'd  
8 like to consider the other elements of confirmation of the plan  
9 under Section 1129 of the Bankruptcy Code.

10 Beginning with Section 1129(a)(1), whether the plan  
11 complies with the applicable provisions of Title 11. I'm  
12 satisfied based on the entire record, statements that have been  
13 made, and the fact that while many the matters in the case have  
14 been contested from time to time, this is uncontested, that the  
15 plan complies with the applicable provisions of Title 11, and  
16 the claims-in-interest have been appropriately classified and  
17 alike. Based on the entire record these are some, not all of  
18 the grounds of course that warrant that finding.

19 Under 1129(a)(2) is the Court is required to determine  
20 whether the plan proponent has complied with the applicable  
21 provisions of Title 11. I'm satisfied that this has been  
22 complied with. We have approved filings made quite recently, a  
23 record that complies with the requirements of this provisions  
24 including the certification of ballots, and the like.

25 Again, I note that this is uncontested with respect to

1 Section 1129(a)(3). I pass for the moment because this is  
2 contested, to 1129(a)(4).

3 The approval of costs and expenses, that all fees and  
4 costs to be paid by the debtor, must either have been approved  
5 by the Court or subject to such approval. I'm satisfied on the  
6 record that this element of confirmation has been satisfied.

7 With respect to disclosure of officers and directors  
8 of the reorganized directors and insiders to be employed  
9 subject to the modifications set forth on the record, to the  
10 extent that they are implicated by 1129(a)(5), I am persuaded  
11 that this element of confirmation has been satisfied.

12 Moving to 1129(a)(6), which is regulatory approvals.  
13 I am satisfied that this is not implicated by the matter that  
14 is before the Court in that there are no rate changes or other  
15 types of matters subject to the jurisdiction of a government  
16 regulatory commission, and so this not an applicable term.

17 The best interest of creditors test contained in  
18 Section 1129(a)(7), this has been -- I'm satisfied by the  
19 record that this has been met as well, including for the  
20 reasons set forth in the Pinson affidavit at paragraph 33 and  
21 the disclosure statement's liquidation analysis.

22 Moving to acceptance of the plan, 1129(a)(8), I am  
23 satisfied that we have basis to proceed here, based on the  
24 deemed rejected status under -- of Class 5. And that will take  
25 us to our cram-down analysis in a moment.

1 Priority claims, 1129(a)(9), I'm satisfied that they  
2 are appropriately treated by the plan, that administrative  
3 claims, allowed priority claims and all other priority claims  
4 are appropriately treated and addressed by the plan.

5 1129(a)(10), the questions whether one impaired class  
6 has accepted the plan; and this has been satisfied because the  
7 debtor's certification of ballots indicates that SDF, the  
8 impaired secured creditor, has accepted the plan along with  
9 four of the impaired unsecured creditors in Class 4.

10 The question of feasibility, sometimes a very  
11 contested issue, not contested here. Section 1129(a)(11),  
12 requires the Court to find that confirmation is not likely to  
13 be followed by liquidation, indeed, further financial  
14 reorganization of the debtor, unless such is proposed in the  
15 plan. The question is whether there is reasonable assurance of  
16 success, I am persuaded that this has been met.

17 Moving to the question of payment of fees to the  
18 United States Trustee, Section 1129(a)(12), this has been taken  
19 care of, addressed in the plan, because the plan provides for  
20 payment in full of these fees. Were it otherwise I'm sure we  
21 would have heard from the Office of the United States Trustee.

22 1129(a)(13), retiree benefits doesn't seem to be  
23 applicable here. Avoidance of taxes, 1120 -- excuse me,  
24 1129(d), provides that a plan may not be confirmed if the Court  
25 finds that the principle purpose of the plan is the avoidance

1 of taxes or the avoidance of the application of registration  
2 requirements of Section 5 of the Securities Act of 1933. This  
3 does not -- neither of these is an impediment or an issue with  
4 respect to confirmation here.

5 1129(b), the question of cram-down. Having gotten to  
6 the point subject to the Court's determination with respect to  
7 good faith, determining whether this test is met, I'm -- I  
8 guess will set for the moment, to the side following path that  
9 we should get to this question only after concluding that all  
10 the other requirements of confirmation are met.

11 That brings me back to the question of good faith.

12 And Ms. Kachan you can call your first witness.

13 MS. KACHAN: Yes, Your Honor. We feel, once again,  
14 when we began --

15 THE COURT: Maybe -- can I ask you to speak from the  
16 podium?

17 MS. KACHAN: Sure.

18 THE COURT: It will be more helpful, because that way  
19 everyone's going to be able to see.

20 MS. KACHAN: Your Honor, from the beginning of this  
21 case we were -- we've felt that in order to make a decision on  
22 this plan, in order to make any voting decision on this plan we  
23 needed to understand several factors of what had transpired.

24 THE COURT: Ms. Kachan, who's your first witness?

25 MS. KACHAN: Which is why we had asked for this --



1 THE COURT: Who's your first witness?

2 MS. KACHAN: Our first --

3 THE COURT: Who will you be calling.

4 MS. KACHAN: Mr. Dikman.

5 THE COURT: Okay. I think we've -- it's time to take  
6 the evidence, Ms. Kachan.

7 MS. KACHAN: Okay.

8 THE COURT: I've heard your concerns, I've heard your  
9 concerns about discovery --

10 MS. KACHAN: There -- I --

11 THE COURT: The question you raised is whether this  
12 plan has been proposed in good faith --

13 MS. KACHAN: I know.

14 THE COURT: -- and not by any means prohibited by law.

15 MS. KACHAN: Okay.

16 THE COURT: I'd like to hear from you.

17 MS. KACHAN: Okay. Okay, Your Honor.

18 THE COURT: Well, I suppose in the first instance the  
19 debtor has the burden, but I'm satisfied by the proffer that  
20 we've received and by the entire record, and I suppose we  
21 should be absolutely clear that there has been -- that we take  
22 a formal proffer on this.

23 MS. KACHAN: Okay.

24 THE COURT: May I ask you to --

25 MS. KACHAN: Yes.

1 THE COURT: Proffer, debtor's counsel, with respect to  
2 the question of good faith. All right?

3 MS. SCHWARTZ: I'm sorry, Judge, I didn't hear the  
4 last thing you said.

5 THE COURT: I'm losing my voice, it's been a long day.  
6 Here's what I'm going to do, I'm going to give you a minute or  
7 two -- I may just stand in the hallway -- to prepare to address  
8 the question that is disputed between the parties, the only  
9 element of confirmation that is disputed, which is whether the  
10 plan has been proposed in good faith and not by any means  
11 prohibited by law.

12 MS. SCHWARTZ: Judge, I'm --

13 THE COURT: The debtor, as the prep --

14 MS. SCHWARTZ: -- prepared to address that right now.

15 THE COURT: The debtor, as the proponent of  
16 confirmation, needs to make a record. You can then -- your  
17 argument, it seems to me, you have the opportunity to put on  
18 evidence, if you'd like.

19 MS. KACHAN: Okay.

20 THE COURT: Call your first witness will be my  
21 direction to you.

22 MS. KACHAN: We will.

23 THE COURT: And then I'll take argument on that. But  
24 of course the hour is late; so I -- you have all the time you  
25 need, but I absolutely don't encourage you to take unnecessary

1 time to repeat unduly things that are on the record. All  
2 right?

3 MS. KACHAN: Absolutely, Your Honor.

4 THE COURT: Would you like to take -- would you like a  
5 minute or two to get organized or you're ready to proceed?

6 MS. SCHWARTZ: Judge, I'm prepared --

7 THE COURT: Please proceed.

8 MS. SCHWARTZ: I'd like you to know --

9 THE COURT: Good, thank you. Please proceed. All  
10 right, Ms. Kachan you can yield the podium.

11 MS. SCHWARTZ: Judge, with respect --

12 THE COURT: I'm going to ask you to come to the  
13 podium, okay?

14 MS. SCHWARTZ: Judge, with respect to Section  
15 1129(a)(3) of the Bankruptcy Code, the question is whether the  
16 plan has been proposed in good faith and not by any means  
17 forbidden by law. Now with respect to what Mr. --

18 THE COURT: Thank you.

19 MS. SCHWARTZ: I beg your pardon, what Ms. Kachan, and  
20 perhaps Mr. Dikman have to say with regard to that, I don't  
21 know. What I can say is that, the allegations with regard the  
22 various closings and what transpired at those closings whether  
23 those are bad acts or not I cannot address, but that has  
24 nothing to do with whether or not this plan was proposed in  
25 good faith. Those are entirely separate scenarios.

1           This is a plan. The debtor filed a bankruptcy; the  
2 debtor sought financing from its secured lender; and the debtor  
3 negotiated the terms of its plan with the secured lender.

4           THE COURT: And I take it that in substance, if the  
5 debtor's principal was called to testify as to those matters,  
6 his testimony would be consistent with the statements you're  
7 making on the record as to the facts, is that correct?

8           MS. SCHWARTZ: With respect to the negotiations of the  
9 plan, absolutely, Judge. And that is the plan that has been  
10 proposed. It was modified several times as the Court is aware,  
11 as we've gone through the amended disclosure statement, now the  
12 second amended plan and disclosure statement, and we are here  
13 today to say that this plan was proposed in good faith and that  
14 is the debtor's position.

15          THE COURT: All right. Is Mr. Pinson present in the  
16 courtroom?

17          MS. SCHWARTZ: Yes, he is.

18          THE COURT: Mr. Pinson, could I ask you to come to a  
19 microphone just so we can make a record.

20                You've heard what counsel for the debtor's indicated  
21 with respect the circumstances of the proposing of the plan,  
22 and whether it was proposed in good faith and not by any means  
23 forbidden by law, and I have already your affidavit before me.  
24 Can you swear or affirm on the record that if you were called  
25 to testify, placed under oath or affirm that your testimony

1 would be the truth and asked questions on the subjects that  
2 your counsel's described -- the debtor's counsel's described,  
3 would your testimony be the same as that as has been described?

4 THE WITNESS: Yes, it would.

5 THE COURT: All right, thank you. Will you like to  
6 cross examine?

7 MS. KACHAN: Yes, Your Honor.

8 THE COURT: All right. Mr. Pinson, we're going to  
9 have to put you on the witness stand and we'll have cross-  
10 examination. I want to be clear the cross examination is  
11 limited to the scope of the proffer, which concerns the  
12 proposing of the plan, all right?

13 MS. KACHAN: May I question regarding the closing that  
14 we discussed, Your Honor?

15 THE COURT: It was not part of the presentation, so I  
16 think it's outside the scope of the good-faith proffer. All  
17 right, you can -- and I'll say again, timely, for the record,  
18 that the question the Court has to answer under Section  
19 1129(a)(3) is whether the plan is proposed in good faith, and  
20 not by any means forbidden by law.

21 MS. KACHAN: Your Honor, it is --

22 THE COURT: All right. You have to swear the witness.

23 (Witness sworn)

24 THE CLERK: Please state your name for the record.

25 THE WITNESS: Jacob Pinson.

1 THE CLERK: Please spell your last name.

2 THE WITNESS: Jacob Pinson, P-I-N-S-O-N.

3 THE COURT: Thank you, Mr. Pinson.

4 Ms. Kachan, please come up to the podium and you may  
5 inquire.

6 MS. KACHAN: Your Honor, just --

7 THE COURT: You may inquire.

8 MS. KACHAN: Yes, I understand. I'm asking, whether I  
9 may -- my questions have to do, my -- I assert that it was  
10 filed -- that the plan was filed in bad faith because we  
11 understand that several things took place during closings --

12 THE COURT: Ms. Kachan, please would you ask the  
13 witness a question?

14 MS. KACHAN: Your Honor, I'm asking you if I may?

15 THE COURT: If it's objectionable have an objection --

16 MS. KACHAN: Okay.

17 THE COURT: -- and I'll rule.

18 MS. KACHAN: Okay.

19 THE COURT: Thank you so much.

20 MS. KACHAN: Okay.

21 CROSS-EXAMINATION

22 BY MS. KACHAN:

23 Q. Mr. Pinson, to the best of your knowledge, has there ever  
24 been, in closings of the units during the time that the units  
25 were closing, has there ever been a variance between the price

1 on the contract and the price actually received at closing?

2 MS. SCHWARTZ: Objection.

3 THE COURT: Grounds?

4 MS. SCHWARTZ: Relevancy to proposing the plan in good  
5 faith.

6 THE COURT: Can you connect it to the proposal of the  
7 plan?

8 MS. KACHAN: Yes, Your Honor. We are discussing that  
9 the plan was proposed in good faith and under the law.  
10 Obviously if funds were being siphoned from the closings and  
11 for the purposes of not reporting them to the IRS, that is and  
12 I would say (indiscernible) and automatically reported as  
13 borrowed and the amounts reported as owed, therefore we cannot  
14 say that the plan is (indiscernible) if the amount -- the  
15 amounts that the debtor sets in his plan and the monies that he  
16 had borrowed from his creditors of which my clients are seventy  
17 percent or eighty percent, actually, as proposed by the  
18 debtor's counsel (indiscernible) been borrowed money from.  
19 This money was used, monies received from closings may not have  
20 been paid to my clients as it was supposed to be according to  
21 the agreements because money was being illegally siphoned.

22 And if money was indeed taken, whether under the table  
23 or not reported in order to obstruct the tax reporting,  
24 obviously that is done in obstruction of the law and that is  
25 not in accordance of the law and that is something now for --

1 if we are going by those numbers by those closing statements if  
2 the debtor proposed his plan, relying on those closing  
3 statements, which are in fact false, then the plan is proffered  
4 in bad faith.

5 THE COURT: I'm going to sustain the objection because  
6 as you have set forth the grounds for your interest in the  
7 subject, I don't see a sufficient connection, really any  
8 connection at all yet to the plan being proposed in good faith.  
9 In overruling your obj -- in sustaining the objection, I am,  
10 I'll encourage you to refocus your question so that it is  
11 directed to the question of whether the plan has been proposed  
12 by the debtor in good faith and not by any means forbidden by  
13 law. I don't see the connection -- it sounds perhaps that your  
14 clients may have a dispute as to whether they were paid an  
15 adequate commission, but I don't yet see the connection to  
16 whether the plan was proposed in good faith.

17 So the objection is sustained. You may ask -- I  
18 encourage you to reframe the question so it addresses the  
19 question of whether the -- it helps the Court form a conclusion  
20 on the disputed issue of whether the plan was proposed in good  
21 faith.

22 BY MS. KACHAN:

23 Q. Mr. Pinson, in formulating the plan, and in formulating  
24 the amount owed to your secured and unsecured creditors, did  
25 you -- well, rather, did you take into account all of the



1 monies that were paid at closings and all of the lawful  
2 expenses that were taken at closings in the unit?

3 MS. SCHWARTZ: Objection.

4 THE COURT: I'm going to overrule that -- well,  
5 grounds?

6 MS. SCHWARTZ: Relevancy. It's not relevant to how  
7 the plan was proposed.

8 THE COURT: Well, the question is did you consider  
9 this in connection with the plan. I think that the debtor's  
10 principal can answer that question.

11 A. Absolutely. It was all considered.

12 THE COURT: Okay, next question.

13 Q. You considered the amounts (indiscernible) inconsistency  
14 with the amounts received from all closings of the units and  
15 all of the expenses in court in connection with the closings of  
16 the units?

17 A. Absolutely --

18 MS. SCHWARTZ: Objection.

19 A. -- it was all considered.

20 THE COURT: Objection is overruled. I think this  
21 is -- I'm drawing a broad -- I'm permitting a broad scope of  
22 inquiry here. The witness has already begun the answer. And  
23 the objection is and would have been an advance of rope.

24 You can continue your answer, Mr. Pinson.

25 THE WITNESS: I object to this form of questioning in

1 general.

2 THE COURT: It's not -- I'm sorry, you're the witness.

3 THE WITNESS: No, no, I just --

4 THE COURT: You have a fine lawyer --

5 THE WITNESS: Okay.

6 THE COURT: -- who will do the objecting.

7 THE WITNESS: Okay. I didn't mean in that sense.

8 A. There were various closings, and I'm not sure what she's  
9 referring to as far as avoiding taxes. That has never been the  
10 case, I don't do this. I don't know -- I have no idea what  
11 she's referring to. There was never any intent along that --  
12 along that line of -- of talking. But there was a number of  
13 diff -- of closings, that the contract, and when it came to the  
14 closing there were small variations. Every -- every contract  
15 was very specific to the individual. Sometimes there was a  
16 claim that the individual that bought the unit had to have some  
17 repairs, sometimes there was a claim about a deficiency about  
18 of an appliance. And at the closing, there was vari -- at  
19 various times, some adjustments.

20 So there may have been a variation from the actual  
21 contract to when the closing what was paid. The commissions,  
22 though were always paid a hundred percent on this -- on the  
23 price of the contracts. I have no idea what she's referring  
24 to.

25 THE COURT: All right. Next question, Ms. Kachan.

1 Q. Mr. Pinson, you're saying that there were variations from  
2 closing to closing. Would you say these variances were in the  
3 tens of thousands? In the thousands? In the hundreds of  
4 thousands?

5 A. I -- I don't recall, it varied.

6 Q. Would it be plausible that they were in the hundreds of  
7 thousands?

8 A. Probably not.

9 THE COURT: Any further questions?

10 MS. KACHAN: Yes.

11 Q. Mr. Pinson, in proffering the plan obviously there was --  
12 there is a secured creditors' claim. The secured creditors'  
13 claim at this point is thirty-three million dollars. And as  
14 you know that my clients objected partially on the basis that  
15 there was a proceeding -- state court action having to do with  
16 the transfer of the property, and a major question has been of  
17 how this debt really was incurred, besides the fact that we  
18 proffered that it should not have been incurred without their  
19 consent, but the question -- and the transfer should not have  
20 been done without their consent. The question is all the  
21 monies, where -- or do you think you would be able to account  
22 for all the monies provided and financed with regard to this  
23 project? Would you say that all of the monies were applied  
24 properly?

25 MS. KACHAN: And, because it would go, Your Honor, to

1 the (indiscernible) secured claim --

2 THE COURT: Remember, you're posing a qu -- I'm going  
3 to ask you to --

4 MS. KACHAN: Yes.

5 THE COURT: -- restate your question.

6 Q. Would you say that all monies borrowed were applied to  
7 their rightful usage?

8 A. Absolutely. And more than saying that, I was controlled  
9 by the bank. I couldn't do anything that I wanted without the  
10 bank's permission, so everything that was spent, everything was  
11 there, whatever the thirty-three million dollars, is based on  
12 the bank's permission that they allowed, and they okayed.

13 Q. But at any point did you obtain -- or let me rephrase  
14 that, did you obtain the agreement from all of your -- of all  
15 of the members of your corporation, of your LLC?

16 A. Agreement for what?

17 Q. In incurring financing?

18 THE COURT: If you don't understand the question, you  
19 should simply indicate that you don't understand the question.

20 A. I don't understand the question.

21 Q. At the time that you were obtaining financing or  
22 additional financing did you at all times obtain the consent of  
23 all of the members of your LLC?

24 MS. SCHWARTZ: Objection. There's no relevance to  
25 that question as it relates to --

1 THE COURT: I'm going to sustain the objection, I  
2 don't see the connection. If you'd like to try to connect it,  
3 please rephrase -- reframe the question.

4 Q. Mr. Pinson, in the process of funding this project, when  
5 you were funding this project, when you were incurring over  
6 twenty-five million dollars more further money was incurred, at  
7 each time that you incurred or asked for additional financing,  
8 did you, in accordance with all your applicable corporate  
9 documents and corporate agreements, did you comply with these  
10 documents and with these agreements, in obtaining consent of  
11 your managing members?

12 MS. SCHWARTZ: Objection. Not relevant to proposing  
13 the plan in good faith.

14 THE COURT: Ms. Kachan, I'm going to ask to remember  
15 that the question here that you have put in issue is --

16 MS. KACHAN: Good faith, yes.

17 THE COURT: -- whether the plan is proposed in good  
18 faith and not by any means forbidden by law. I've indicated,  
19 and I have in fact given you a broad --

20 MS. KACHAN: Okay.

21 THE COURT: -- range with respect to questioning, but  
22 I'm going to sustain the objection. I think it is not  
23 adequately connected to the matter at issue.

24 MS. KACHAN: I have a further question, Your Honor.

25 THE COURT: All right.

1 BY MS. KACHAN:

2 Q. Mr. Pinson, as -- would you say that the closing  
3 statements for each closing adequately reflect all of the  
4 expenses paid in connection or at the closings?

5 MS. SCHWARTZ: Objection. Judge, the entire line of  
6 questioning has no relation proposing the plan --

7 MS. KACHAN: Your Honor --

8 MS. SCHWARTZ: -- in good faith.

9 THE COURT: And I think this may have well been  
10 covered by some of the broader questions and answers that have  
11 already happened.

12 MS. KACHAN: Your Honor, there's a specific reason --

13 THE COURT: I'll overrule the objection. I hope we  
14 can move through this fairly quickly. For -- in order to move  
15 this forward, I'll overrule the objection, but I think this at  
16 the outer boundary of the outer boundary of what could even  
17 conceivably be relevant to the issue before the Court. You may  
18 answer the question.

19 THE WITNESS: Could you repeat the question?

20 THE COURT: I'm sorry.

21 BY MS. KACHAN:

22 Q. Do the closings statements, for each closing, to the best  
23 of your knowledge, adequately reflect all of the expenses paid  
24 at each closing?

25 A. Absolutely. I had a control over myself, which was the

1 bank. Before any closing could happen, a statement of all the  
2 expenses had to be provided by my attorney to the bank. The  
3 bank had to sign off and approve it and release each unit. I  
4 couldn't do anything on my own that I wanted. Once the bank,  
5 with my attorney, approved whatever the closing costs and  
6 expenses, they signed off, and that's how the closing happened.

7 Q. That was not the question that I asked you, Mr. Pinson. I  
8 asked if every closing had in fact -- every closing statement  
9 had in fact reflected all of the expenses paid at the time of  
10 the closing, if to the best of your knowledge that is the case.

11 A. Yes, to the best of my knowledge, absolutely.

12 Q. Okay. Would you -- are you familiar with a gentlemen by  
13 the name of Mr. Lockshen (ph.)?

14 A. Yes.

15 MS. SCHWARTZ: Objection.

16 THE COURT: I have no idea. I -- could you --

17 MS. KACHAN: Your Honor, this goes to --

18 THE COURT: Well the question's been answered.

19 MS. KACHAN: Well this goes to a statement on the  
20 (indiscernible) that the other lawyer --

21 THE COURT: There's no pending objection, you don't  
22 need to argue. Pose your --

23 MS. KACHAN: Okay.

24 THE COURT: -- next question, please. And could you  
25 give me an estimate as to how much longer you'll be

1 questioning --

2 MS. KACHAN: I think this is the last question, Mr.  
3 Pinson, that I will --

4 THE COURT: Then we'll --

5 MS. KACHAN: Yeah.

6 THE COURT: -- have redirect.

7 MS. KACHAN: Um-hum.

8 THE WITNESS: I answered.

9 THE COURT: Would you state your question?

10 MS. KACHAN: Yes.

11 BY MS. KACHAN:

12 Q. Do you know a person by the name of Mr. Lockshen?

13 A. Yes, I do.

14 Q. And who is Mr. Lockshen?

15 A. Mr. Lockshen was brought in to help finalize and complete  
16 the project that the bank wasn't willing to fund. Mr. Lockshen  
17 independently made a deal with the bank on a certain structure  
18 that he would fund the closing and get paid out of closings.

19 Q. Was the compensation to Mr. Lockshen reflected on the  
20 closing statements?

21 A. Again, in the closings statements -- I wish you would look  
22 at one so you would avoid all these questions.

23 Q. I would -- I did.

24 A. In the closing statement there is compensation from  
25 closings to Mr. Lockshen approved by the bank. Again, not by



1 me. They had a separate independent deal, the bank had to see  
2 it, the bank saw on every closing how much Mr. Lockshen is  
3 receiving, they had their deal and that was based on their  
4 deal. They approved it; had nothing to do with me.

5 THE COURT: All right. Anything further

6 MS. KACHAN: Not of this witness, Your Honor.

7 THE COURT: Thank you. Redirect.

8 REDIRECT EXAMINATION

9 BY MS. SCHWARTZ:

10 Q. Mr. Pinson, in negotiating and drafting the plan of  
11 reorganization, do you stand by your affirmation that the plan  
12 was proposed in good faith?

13 A. Yes, I do.

14 MS. SCHWARTZ: Thank you.

15 THE COURT: Thank you. All right. Any recross?

16 MS. KACHAN: No, Your Honor. I would like --

17 THE COURT: Thank you.

18 MS. KACHAN: -- a minute with my client before I do my  
19 direct, if I may?

20 THE COURT: All right, you're going to call your  
21 client as your next witness?

22 MS. KACHAN: Yes.

23 THE COURT: And is this your final witness?

24 MS. KACHAN: Yes.

25 THE COURT: All right, you may have a couple of

1 minutes.

2 MS. KACHAN: Thank you.

3 THE COURT: We're going to take a short break off the  
4 record.

5 You are excused, Mr. Pinson.

6 THE WITNESS: Thanks.

7 THE CLERK: All rise.

8 (Recess from 7:18 p.m. until 7:43 p.m.)

9 THE COURT: Ms. Kachan, are you ready to proceed?

10 MS. KACHAN: Yes, I am.

11 THE COURT: Please be seated.

12 MS. KACHAN: Your Honor, we offer as a witness, Mr.  
13 Dikman, principal of Metropolitan Estates.

14 THE COURT: All right, Ms. Jackson, would you swear  
15 the witness please?

16 (Witness sworn)

17 THE CLERK: Please state your name for the record, and  
18 also please spell it.

19 THE WITNESS: Alexander Dikman, D-I-K-M-A-N.

20 THE COURT: All right, you may inquire.

21 DIRECT EXAMINATION

22 BY MS. KACHAN:

23 Q. Good evening, Mr. Dikman. Mr. Dikman, do you believe that  
24 the debtor's plan has been offered in good faith?

25 A. No, I don't think so, because the number of thirty

1 millions, or about thirty millions dollars owed to the secured  
2 creditor, I believe is inflated, because when this number was  
3 calculated, not all the numbers paid at the closing was taken  
4 in consideration, taken in account. I think the whole idea of  
5 this plan is to inflate this number and make the possibility  
6 for unsecured creditors to get their part of money virtually  
7 impossible.

8 Q. Do you think that the plan was proposed with honesty as  
9 the standard for proposed in good faith?

10 A. As I said, I don't think so.

11 Q. What causes you to believe that the plan and the amounts  
12 therein are dishonest? Was there, at any point, an instance  
13 where you believe there was dishonesty involved?

14 A. Yes. Unfortunately, I wasn't prepared for this testimony  
15 and I don't have all the documents with me and I didn't prepare  
16 all --

17 Q. To the best of you recollection.

18 A. But just for example, one of them is, that closing when  
19 the price, without any prior notice at the closing was dropped  
20 almost 300,000 dollars. I'm not prepared to say exact number.

21 Q. Okay.

22 A. This to the best of my knowledge, to the best of my  
23 memory.

24 Q. How did you learn about this?

25 A. Yeah, Mr. Wilk called me and said that this closing went

1 down three --

2 MS. SCHWARTZ: Objection, hearsay.

3 MS. KACHAN: Your Honor --

4 THE COURT: Well --

5 MS. KACHAN: -- the witness is --

6 THE COURT: You're required to testify as to your  
7 personal knowledge, what you know, what you said, what you did.  
8 You're under oath --

9 THE WITNESS: It is -- it is at my personal knowledge.

10 THE COURT: -- so must testify accurately. I remind  
11 you of that. The objection that has been interposed is a  
12 hearsay, and an objection typically would be interposed to a  
13 question to the extent that it calls for a hearsay answer. I'm  
14 going to overrule the question, but I note that the hearsay  
15 rule serves a number of purposes, but they all flow from the  
16 fact that hearsay testimony is often simply unreliable.

17 MS. KACHAN: Okay.

18 THE COURT: And so I'll let you answer the question,  
19 but I'll just note on the record --

20 THE WITNESS: Your Honor --

21 THE COURT: -- that I'm aware of the prospect for the  
22 objection to the extent that the witness is testifying about  
23 something that is hearsay. And it will certainly -- often goes  
24 to the weight even if it doesn't go to the admissibility. So,  
25 overruled, you can continue to answer.

1 THE WITNESS: Yeah, so can I finish my testimony?

2 THE COURT: Yes, you may.

3 THE WITNESS: Thank you.

4 THE COURT: Thank you.

5 A. So, as I said, I was contacted by Mr. Wilk and informed  
6 that this closing went 300,000 below the contact.

7 BY MS. KACHAN:

8 Q. What did you do then?

9 A. So, I went to Mr. Pinson and I confront him.

10 Q. And you did that personally?

11 A. Yes, personally.

12 THE COURT: Ms. Kachan, please don't interrupt your  
13 witness.

14 A. Yes, I went personally and contacted Mr. Pinson. And he  
15 admitted that 300,000 dollars was taken, I don't how to call it  
16 properly, besides the documents, besides the closing statement.  
17 I demanded this money would be applied to the offset of the  
18 mortgage or to offset debt to myself. He said he already spend  
19 this money for whatever reason, I don't remember, but he agreed  
20 to pay me difference on the commission. And those checks for  
21 the difference of the commission, I have separate set of  
22 checks, one set of checks for the original commission for about  
23 900,000 dollars -- I'm sorry I can mistaken at this point, but  
24 I can prove this and bring those checks -- and another set of  
25 checks a few days later for the difference on this, on the

1 closing for about 300,000 difference.

2 Q. Why do you say that this difference affects good faith in  
3 which -- with which this plan may have been brought?

4 A. Because this difference supposed to be at the closing, by  
5 the mortgage rules, supposed to go to the bank, to offset debt  
6 to the bank. Which didn't happen.

7 Q. What do you know about a person by the name of Mr.  
8 Lockshen?

9 A. I met Mr. Lockshen many times at the site. He was a  
10 contractor brought -- actually I don't know, by Mr. Pinson or  
11 the bank. But Mr. Lockshen was performing work at the project,  
12 and at certain point as we had a negotiation with Mr. Pinson,  
13 he showed me the closing statements. He and his lawyer, Mr.  
14 Frankel (ph.), showed me the closing statements which are  
15 different from the closing statements that we received  
16 recently. Those closing statements reflect payments to Mr.  
17 Lockshen of about 125,000 dollars per closing. This closing  
18 statement we received recently wasn't reflecting that number.

19 Q. When you say recently, please clarify?

20 A. When we received the opposition -- I'm sorry.

21 Q. Just clarify the (indiscernible) you were saying when you  
22 received these closing statements.

23 A. This closing, I don't believe we received it from Mrs.  
24 Schwartz's office.

25 Q. From the debtor's counsel, correct?

1 A. Yeah.

2 Q. Okay. Why do you think -- well, first of all, do you have  
3 suspicions about the accuracy of the closing statements?

4 MS. SCHWARTZ: Objection.

5 THE COURT: Sustained. Whether or not the witness has  
6 a suspicion is not --

7 MS. KACHAN: I understand.

8 THE COURT: -- the kind of question --

9 MS. KACHAN: I understand.

10 THE COURT: -- that seems to me to be appropriate.  
11 You may reframe the question.

12 MS. KACHAN: I'll withdraw the question.

13 Q. Why do you feel that the discrepancies you described are  
14 relevant to whether the debtor proposed his reorganization plan  
15 in good faith?

16 A. Because, again, I don't know, money paid to Mr. Lockshen  
17 was those money accounted when they calculated this thirty  
18 million debt to the bank or if the payments to Mr. Lockshen was  
19 a part of paying off the mortgage or not.

20 Q. Mr. Dikman, in overall, in seeing the debtor's proposed  
21 reorganization plan, and from your personal knowledge, how do  
22 you feel that the forgoing affected this plan and whether it's  
23 being proposed in good faith and whether it's lawful, whether  
24 it --

25 MS. SCHWARTZ: Objection, asked and answered.

1 THE COURT: It seems so. Would you like to rephrase  
2 the question?

3 MS. KACHAN: Yes.

4 Q. The discrepancies described, how do you feel from  
5 everything that you have described, how do you feel they affect  
6 the lawfulness of the reorganization plan?

7 MS. SCHWARTZ: Objection.

8 THE COURT: This is a fact witness not a -- well I'll  
9 ask you to state the grounds for the objection.

10 MS. SCHWARTZ: The witness can't testify with respect  
11 to lawfulness.

12 MS. KACHAN: Your Honor --

13 THE COURT: The witness --

14 MS. KACHAN: -- but we are saying --

15 THE COURT: -- has not been offered as --

16 MS. KACHAN: -- that it goes to good faith.

17 THE COURT: - as a legal expert.

18 MS. KACHAN: As a -- no. But --

19 THE COURT: He is here --

20 MS. KACHAN: -- as it goes to good faith.

21 THE COURT: -- as a fact witness. Ms. Kachan, it will  
22 go better if you let me speak first, thank you so much.

23 It's -- the question as phrased seeks the debtor's -- excuse  
24 me, the witness' fact testimony as to why he feels something  
25 affects whether the plan is lawful.



1 MS. KACHAN: Okay.

2 THE COURT: The debtor has not been -- I'm so sorry  
3 for saying debtor, the hour is late. For sake of a complete  
4 record it's 7:52 in the evening and I apologize for  
5 misspeaking.

6 The witness is not here as an expert, not in the law,  
7 not on any other matter. He's been called as a fact witness --

8 MS. KACHAN: Okay.

9 THE COURT: -- and his feelings --

10 MS. KACHAN: Okay.

11 THE COURT: -- are not --

12 MS. KACHAN: I will rephrase --

13 THE COURT: -- likely to be an appropriate subject for  
14 testimony on the question of whether the debtor has established  
15 that this plan has been proposed in good faith and not by any  
16 means forbidden by law.

17 You may ask your next question.

18 BY MS. KACHAN:

19 Q. Mr. Dikman, to the best of your knowledge, would any act  
20 committed, that may be prohibited under the law --

21 MR. FEUERSTEIN: Objection.

22 MS. SCHWARTZ: Objection.

23 THE COURT: I'll sustain the objection.

24 MS. KACHAN: Yeah.

25 THE COURT: I think you need to tie that to the

1 proposal of the plan. I think the question is posed as --

2 MS. KACHAN: Let me ask you for what -- Your Honor,  
3 but that's what I'm trying to say.

4 BY MS. KACHAN:

5 Q. Were any acts in connection with how the amounts in the  
6 plan were arrived at in your -- only to your personal  
7 knowledge, were there any unlawful acts committed?

8 A. Yes. As I said the -- I believe the thirty-million-dollar  
9 debt wasn't calculated properly. And two facts we've been  
10 talking about today is only a fracture (sic) of the information  
11 could be discovered if we be allowed to do the proper discovery  
12 at a certain -- and look through certain documents.  
13 Unfortunately I wasn't prepared for this testimony. If I would  
14 be granted more time to prepare, I will product (sic) more  
15 information.

16 THE COURT: Is your recollection impaired in any way  
17 this evening? Have you taken any medication today so that  
18 you're not --

19 THE WITNESS: No.

20 THE COURT: -- able to testify accurately?

21 THE WITNESS: No, it's not. No, it's not.

22 THE COURT: Okay. All right. Next question.

23 Q. Mr. Dikman, what you testified to today, do you have  
24 personal knowledge of discrepancies that you identified or that  
25 you have seen and/or offered test -- and offered testimony in

1 the --

2 MS. KACHAN: Not testimony, I'm sorry. I'm sorry,  
3 Your Honor, it is very late, and I'm also --

4 THE COURT: Take a moment and state your question from  
5 the beginning.

6 Q. In your opinion --

7 MS. KACHAN: May I ask an opinion question?

8 Q. In your opinion, do you --

9 THE COURT: In a general way, opinion questions are  
10 directed to expert witnesses and fact questions are directed to  
11 fact witnesses.

12 MS. KACHAN: Okay. I'll will ask him then.

13 THE COURT: In a general way it's not generally  
14 considered appropriate for a fact witness to testify as to  
15 their opinion.

16 MS. KACHAN: Okay.

17 Q. Mr. Dikman, what --

18 THE COURT: You can pose any question you want and  
19 then we'll see if there's an objection --

20 MS. KACHAN: Okay.

21 THE COURT: -- and I'll rule.

22 BY MS. KACHAN:

23 Q. What discrepancies in closings or occurrences with, in  
24 connection with this project that you feel offend good faith of  
25 this plan?

1 A. Should I say again about those two episodes we've been  
2 discussing before?

3 MS. SCHWARTZ: I'm going to object as asked and  
4 answered.

5 THE COURT: As I understand it --

6 MS. KACHAN: It was very --

7 THE COURT: -- the witness has enquired of counsel  
8 whether he should say something again. I appreciate that you  
9 did take some time to confer and prepare, at the same time I  
10 have to emphasize that this is your testimony, what you should  
11 say is based on your knowledge and recollection. Not what you  
12 may have been told what you should say. So you should listen  
13 to the question, take the time you need to frame your answer in  
14 your mind, give your answer and wait for the next question.

15 THE WITNESS: Okay. Just --

16 THE COURT: But it's not a questions of what you  
17 should say, what counsel should -- what counsel wants you to  
18 say.

19 THE WITNESS: Yeah, Your Honor --

20 THE COURT: It's a question of your testimony.

21 THE WITNESS: If I may?

22 THE COURT: Let's have a question, and then you can  
23 answer it.

24 THE WITNESS: If I may?

25 THE COURT: Let's have -- I am going to ask you to

1 await the next question. Being a witness is different than  
2 anything else. Ms. Kachan, could you please put a question to  
3 the witness?

4 MS. KACHAN: Your Honor, I was really trying to  
5 summarize in asking about everything Mr. Dikman had testified  
6 before. I was asking whether at this --

7 THE COURT: No, you need to put the question to the  
8 witness, not to me.

9 BY MS. KACHAN:

10 Q. Mr. Dikman --

11 THE COURT: Thank you.

12 Q. -- were there, to the best of your knowledge,  
13 discrepancies in any occurrences in connection with this  
14 proposed plan?

15 MS. SCHWARTZ: Objection, asked and answered.

16 THE COURT: I'm going to overrule the objection. You  
17 may answer.

18 A. Yeah. I want to emphasize on this again, that this is not  
19 only best of my -- to the best of my knowledge, but I talked to  
20 Mr. Pinson and he agreed he took those money that's called  
21 under the table and he paid me the different checks on this  
22 amount and I have copies of these checks. This is absolutely  
23 facts that I know. This is not something that I heard from  
24 anybody. This is things I know and I have proof for. Another  
25 account are different closing statements which been showed to

1 me personally in the presence of my lawyer, Mr. Mazarisi (ph.)  
2 the first time and in the presence of my second lawyer Mr.  
3 Shapiro, second time, by Mr. Pinson and his attorney Mr.  
4 Frankel. And this is something I know, I been witness to.  
5 This is not something I heard from somebody.

6 Q. And what were the differences between the closing  
7 statements that were presented to you by Mr. Frankel and  
8 presented to you in the course of this case?

9 A. I don't know if it's any different in a general numbers  
10 but one line in the closing statements by Mr. Pinson and Mr.  
11 Frankel was payment to Mr. -- not to Mr. Lockshen, to some  
12 company, I don't remember the name, but I was told this is to  
13 Mr. Lockshen of 125,000 dollars per closing statement. And I  
14 didn't see those numbers in the closing statements we received  
15 from Mrs. Schwartz's office.

16 Q. These discrepancies, these differences, do you think that  
17 they affect -- or how do think, I'm sorry, not an opinion --  
18 how do you think that they affect whether this plan was  
19 proffered in good faith?

20 A. I'm positive those differences wasn't accounted when the  
21 thirty-million-dollars debt to secured credit -- creditor was  
22 calculated. So I believe that the debt to secured creditor  
23 supposed to be less than thirty million dollars or thirty-one,  
24 in the plan. And this is going to raise the chance for  
25 unsecured creditors to receive at least a fracture (sic) of

1 their money.

2 MS. KACHAN: Thank you Mr. Dikman.

3 Nothing further, Your Honor.

4 THE COURT: Right.

5 THE WITNESS: Can I --

6 THE COURT: You need to stay put --

7 THE WITNESS: Sure.

8 THE COURT: -- because you're going to be cross-  
9 examined. And I have one question for you as a point of  
10 clarification.

11 You were asked a lot of questions and gave a lot of  
12 answers about a particular transaction. Approximately when did  
13 that take place?

14 THE WITNESS: Your Honor, it was probably a couple of  
15 years ago. Maybe more, maybe three --

16 THE COURT: Was it more than two years ago?

17 THE WITNESS: Maybe three, I don't remember. I wasn't  
18 prepared --

19 THE COURT: At least two years ago?

20 MS. KACHAN: At least two years ago, Your Honor.

21 THE WITNESS: At least two years ago, yes.

22 THE COURT: Ms. Kachan, I'm not asking you.

23 MS. KACHAN: Okay.

24 THE COURT: Respectfully.

25 THE WITNESS: At least two years ago, yes.

1 THE COURT: Could it have been before -- two years  
2 ago. Could it have been before February of 2011?

3 THE WITNESS: I'm sorry, Your Honor, I don't remember.  
4 I'm eight years on this project --

5 THE COURT: Okay.

6 THE WITNESS: -- so it's so many controversial  
7 information received from Mr. Pinson and so many things we can  
8 talk about.

9 THE COURT: No, it's --

10 THE WITNESS: So I don't remember the date, I'm sorry.

11 THE COURT: Again, testimony is different from a  
12 conversation. Thank you very much.

13 THE WITNESS: I know.

14 THE COURT: You may cross-examine

15 MS. SCHWARTZ: Thank you, Judge.

16 CROSS-EXAMINATION

17 BY MS. SCHWARTZ:

18 Q. Mr. Dikman were you aware that there was a mortgage on the  
19 debtor's property?

20 A. Sure. Yes.

21 Q. Do you know what amount that mortgage was?

22 A. I, at the time we first signed the agreement with Mr.  
23 Pinson in 2005, mortgage was about -- of course I don't  
24 remember exact number -- about twenty-five million dollars.

25 Q. And do you know if any of that amount was paid down?



1 A. I only can tell you the facts I know for sure.

2 Q. Tell me what you know?

3 A. I know that over the course of maybe seven years, six  
4 years of selling of apartments, this total number received at  
5 closings was about twenty million dollars.

6 Q. When you say the total number received at closings, what  
7 are you referring to?

8 A. I'm referring to the price of the apartments. If you  
9 combine the price of all the apartments sold, actually sold,  
10 it's going to be about twenty million dollars.

11 Q. Okay.

12 A. So subtracted from twenty-five, it's very hard to imagine  
13 how it came to thirty million dollars.

14 Q. Okay. And was -- you testified that you're a  
15 representative of Metropolitan, is that correct?

16 A. Yes.

17 Q. Okay. Was Metropolitan ever paid a commission from any of  
18 these closings?

19 A. Yes.

20 Q. Okay. Do you know how much money Metropolitan received  
21 from the commissions?

22 MS. KACHAN: Objection, Your Honor. I don't see the  
23 relevancy to the good faith --

24 THE COURT: You can respond.

25 MS. KACHAN: -- aspect.

1 MS. SCHWARTZ: Ms. Kachan opened up the door in asking  
2 questions about the various closings, and I'm following up.

3 THE COURT: Overruled.

4 A. I would say, about 6- to 800,000 dollars.

5 Q. Did you actually attend the closings?

6 A. No, never.

7 MS. KACHAN: Objection, Your Honor.

8 A. Mr. Pinson never --

9 MS. KACHAN: Irrelevant.

10 THE COURT: Overruled.

11 A. Mr. Pinson strictly prohibited us from attending the  
12 closings. We tried many, many times but it was always trouble  
13 for us to attend the closings. I don't know why.

14 Q. So your answer is no?

15 A. But if you want to ask me --

16 Q. You did not attend the closings.

17 A. -- I don't know why.

18 Q. That wasn't --

19 A. Okay?

20 Q. -- the question. How did you receive your commission  
21 payments?

22 A. I received a check.

23 Q. You referenced checks in your testimony before and you  
24 said that you would have copies of those checks?

25 A. Sure.

1 Q. Were those checks turned over in the discovery that the  
2 debtor submitted?

3 A. I don't understand the question.

4 Q. Do you recall that Metropolitan was served with certain  
5 discovery demands from the debtor?

6 A. Sure.

7 Q. Okay. Did you work with Ms. Kachan in replying to those?

8 A. Sure.

9 Q. And did you provide her with the copies of the checks that  
10 you referenced?

11 A. Yes.

12 Q. And were they turned over to the debtor in response?

13 A. Of course.

14 Q. And the closing statements that you claimed were different  
15 from the closing statements that were filed with this court --

16 A. Um-hum.

17 Q. -- were those turned over in discovery?

18 A. I didn't have them in my possession. Mr. Pinson never  
19 gave them to me. I demanded two times in the presence of Mr.  
20 Mazarisi, my previous lawyer, and Mr. Shapiro, and Mr. Pinson  
21 said that, first of all he never ever going to give us a single  
22 piece of document in our hands, and then he showed those  
23 closing statements to me. He didn't let me to touch those  
24 closings statements. He showed me them -- those closings  
25 statements from his hands. That's how much he was concerned

1 about me having those documents in my possession.

2 Q. But you were still able to testify about their contents?

3 A. Yeah, I -- by that time my vision was better than now.

4 Q. I'm sorry --

5 A. Yes, I saw the closing statements. I was able to read  
6 them, and remember.

7 Q. And those closings took place when?

8 A. It was couple of occasions, once in Mr. Wilk's office,  
9 maybe four years ago. Another one at Mr. Frankel's office  
10 about the same time. And one more time, I don't remember  
11 where, I'm sorry. Maybe at Mr. Shapiro's office, I'm not sure  
12 about it.

13 MS. SCHWARTZ: One moment, Judge, if I may?

14 THE COURT: Take your time.

15 MS. SCHWARTZ: Nothing further, Judge.

16 THE COURT: All right. Redirect.

17 REDIRECT EXAMINATION

18 BY MS. KACHAN:

19 Q. Mr. Dikman, in preparing discovery, actually answers and  
20 demands, as Ms. Schwartz just asked, do you recall making a  
21 demand for an explanation of these checks?

22 A. Yes, of course.

23 Q. Do you recall if --

24 A. We made a demand --

25 Q. Do you recall if an answer was received?

1 A. As a matter of fact, our first demand for the discovery  
2 process or -- I'm sorry, I'm not lawyer -- in return for this  
3 demand we received very general information like the mortgage  
4 note and the some publically accessible documentation and  
5 something -- my personal feeling was they trying not to show me  
6 any documentation.

7 Q. Did -- do you recall making a specific demand for an  
8 explanation of the checks discussed in your testimony?

9 A. Yes. After receiving this very, I would call it, general  
10 answer to our demand, we prepared more detailed, and one of  
11 them was demand to explain the nature of this difference in the  
12 numbers on that closing.

13 Q. Do you recall if you provided the physical checks --

14 A. Sure.

15 Q. -- for this demand?

16 A. I did provide the physical checks and they've been  
17 attached to the demand and supposed to be sent to the --

18 Q. Um-hum.

19 A. -- different --

20 Q. Do you recall if a response was ever received?

21 A. No. No I don't -- we didn't receive any answer.

22 Q. As to the closing statements that you've testified you  
23 know of a discrepancy, did you personally see the closing  
24 statements that were --

25 A. Yes.

1 Q. -- the actual closing statements at the closing?

2 MS. SCHWARTZ: Asked and answered.

3 THE COURT: It seems so, but it's been answered again.  
4 Overruled.

5 Q. Did you personally see the information on those closing  
6 statements?

7 A. Yeah, I saw them, I demand the copies, I was rejected, and  
8 I was told specifically by Mr. Pinson and Mr. Frankel in the  
9 presence of my lawyer Mr. Shapiro, that they never ever at any  
10 circumstances will provide us with any kind of documentation  
11 they have.

12 Q. Do you recall whether these closing statements were a part  
13 of the demands made in the course of the discovery process  
14 here?

15 A. Yes.

16 Q. Was a response every received?

17 A. No, we didn't receive any response to this request.

18 MS. KACHAN: Thank you, nothing further, Mr. Dikman.

19 THE COURT: All right, any recross?

20 MS. KACHAN: Thank you, Your Honor.

21 THE COURT: Are we done? We need to let the lawyers  
22 have the opportunity for a recross.

23 THE WITNESS: Okay.

24 MS. SCHWARTZ: Nothing on recross.

25 THE COURT: All right. You are excused.

1 THE WITNESS: Thank you.

2 THE COURT: Thank you very much.

3 THE WITNESS: Thank you, Your Honor.

4 THE COURT: Any further witnesses?

5 MS. KACHAN: No, Your Honor.

6 THE COURT: Any rebuttal witness?

7 MS. SCHWARTZ: Judge, I'd like to recall Mr. Pinson.

8 THE COURT: All right. Mr. Pinson.

9 FURTHER REDIRECT EXAMINATION

10 BY MS. SCHWARTZ:

11 Q. Mr. Pinson, a question was asked earlier with respect to  
12 an individual named Mr. Lockshen. Do you recall that?

13 A. Yes.

14 Q. Can you explain how Mr. Lockshen was paid?

15 A. Again, Mr. Lockshen had an agreement with the bank because  
16 he invested his own funds to finish the project when the bank  
17 wasn't willing to fund the completion. He had a separate  
18 independent deal with the bank that he would get paid from  
19 closings with the approval of the bank. He had a specific  
20 dollar amount from every closing that he would get paid for his  
21 investment plus some profit that he agreed upon with the bank.

22 Q. And all of this was approved by the bank?

23 A. All -- every penny that was distributed from closing had  
24 to be approved from the bank beforehand, before the bank would  
25 sign off. Mr. Dikman was well aware of it. As he mentioned,

1 he spoke to Mr. Lockshen many times, he met him many times, he  
2 was well aware that he was funding the project and he was  
3 getting paid from closings.

4 Q. Do you recall how many closings Mr. Lockshen was involved  
5 with?

6 A. Not really. I do know at the end of the project he was  
7 still owed a lot of money and didn't get paid for a couple of  
8 years later from the bank.

9 MS. SCHWARTZ: Nothing further, Judge.

10 MS. KACHAN: If I may, Your Honor?

11 THE COURT: Yes.

12 FURTHER RECROSS-EXAMINATION

13 BY MS. KACHAN:

14 Q. Mr. Pinson, did you provide closing statements to Mr.  
15 Dikman and Mr. Wilk?

16 A. I don't know specifically on the details, but they knew  
17 every closing, yes.

18 Q. That's not what I asked. Did you provide the actual  
19 closing statement?

20 A. I didn't provide it, I didn't have it, it was from my  
21 attorney.

22 Q. Are you aware if your attorney provided them?

23 A. I don't know.

24 Q. Are you aware of the demands made in the course of this  
25 litigation? The demanding for the closing statements?



1 A. I'm not sure.

2 Q. Were you informed at any time that demands were made for  
3 closings statements?

4 MS. SCHWARTZ: Objection.

5 MR. FEUERSTEIN: Objection.

6 THE COURT: Ms. Kachan, I'm going to overrule the  
7 objection, but that may be the seventh or eighth question in a  
8 row that went to substantially the same area --

9 MS. KACHAN: Okay.

10 THE COURT: -- so I encourage you to explore it as  
11 thoroughly as you need to --

12 MS. KACHAN: Okay.

13 THE COURT: -- but to be mindful of questions that may  
14 have been answered --

15 MS. KACHAN: Okay.

16 THE COURT: -- asked and answered in substance more  
17 than once already.

18 MR. FEUERSTEIN: Your Honor, if I may, it's also  
19 outside of the scope of the direct examination with respect to  
20 the rebuttal witness.

21 THE COURT: And the re -- and, well, there is that.

22 MS. KACHAN: Your Honor, Ms. Schwartz, did open the  
23 door to it.

24 THE COURT: I was focusing on the asked and answered  
25 aspect of it. I'm sorry, I should have permitted the counsel

1 to state the grounds.

2 Objection's overruled, question's been answered.

3 Please ask your next question.

4 BY MS. KACHAN:

5 Q. Okay. Do you recall the specific closing that we have  
6 discussed here today?

7 A. Not at the moment.

8 Q. No recollection at all?

9 A. I have some recollection, but not in details. I can't  
10 answer you.

11 Q. Do you have any recollection of the conversations  
12 regarding that closing with Mr. Dikman or Mr. Wilk?

13 A. Somewhat. Not to the extent of the dollar amount that  
14 he's referring to. As I said earlier, every closing -- not  
15 every closing -- many closings had differences at the time from  
16 the contract to when the actual closing. There were credits  
17 given for different reasons for different opportunities for  
18 different work that had to be done. I believe the specific one  
19 that you have in mind if I -- correct me, if my recollection is  
20 correct, there was a lot of work in the unit that had to be  
21 done. The individual that bought the unit happened to be a  
22 contractor or a plumber himself and ended up doing a tremendous  
23 amount of work and was given a specific credit for it. I don't  
24 remember the amount.

25 Q. So it is your testimony that that discrepancy was for the

1 unit?

2 A. Most, I believe so, as far I can recollect.

3 Q. Do you have a recollection of issuing additional checks to  
4 Mr. Dikman and Mr. Wilk in connection with that closing?

5 A. Mr. Wilk and Mr. Dikman got paid different commissions  
6 from my attorney because they had more than one entity where  
7 the commissions were paid to for various reasons, and they  
8 weren't always one specific check. It was sometimes that my  
9 attorney paid him two checks or three checks, and maybe not all  
10 the same day, a day later. I don't remember specifics.

11 MS. KACHAN: Your Honor, if I may confer with my  
12 client for one second? If I may, my client just had something  
13 to tell me, is that --

14 THE COURT: All right.

15 Q. Mr. Pinson, was there, to the best of your recollection,  
16 any other occasion when you had issued different checks on  
17 different -- on one particular closing to Mr. Dikman and Mr.  
18 Wilk?

19 A. Possibly, I don't recall.

20 Q. So it's your testimony that this monies has to do with --

21 MS. KACHAN: I'm sorry, I'm going to rephrase, Your  
22 Honor.

23 Q. Do you have any recollection of the statements made by Mr.  
24 Dikman today -- that you had made to Mr. Dikman in connection  
25 to that closing?

1 A. He made a lot of statements. I don't know what you're  
2 referring to.

3 Q. Do you have any recollection to the statements you made in  
4 connection with the nature of the discrepancy with regard to  
5 that closing?

6 A. Not specific.

7 Q. Do you have any recollection -- or from your recollection,  
8 was there a difference or any discrepancy between the closing  
9 statements provided by the closings and the closing statements  
10 that are provided in the course of this litigation?

11 A. I don't understand the question. I think I just answered  
12 it. It was slightly different.

13 Q. No this is a different question. I'm asking you not with  
14 regard to any specific closing, I'm asking you with regard to  
15 discrepancies in the closing statements that were provided at  
16 time of each closing and the ones that were produced in the  
17 discovery -- actually not produced, but ordered in the course  
18 of this litigation as exhibits or elsewhere?

19 A. No, not that I know of.

20 MS. KACHAN: Nothing further.

21 THE COURT: All right. Any further questions?

22 MS. SCHWARTZ: Nothing further, Judge.

23 THE COURT: You are excused. Thank you very much.

24 All right.

25 Any further witnesses? Oh, we're in rebuttal, so the

1 answer is we're -- are we done -- does the debtor rest?

2 MS. SCHWARTZ: Yes.

3 THE COURT: Does the --

4 MS. KACHAN: Yes, Your Honor.

5 THE COURT: All right. I'm going to take a minute or  
6 two look over my notes and come back and have a decision for  
7 you. Thanks.

8 MS. KACHAN: Thank you.

9 THE CLERK: All rise.

10 (Recess from 8:19 p.m. until 8:35 p.m.)

11 THE COURT: Please be seated.

12 First of all, I want to thank you for your patience  
13 this evening. I know it's been a long hearing, but it's  
14 important and necessary to make a full record, and I'm glad  
15 that you've had the opportunity to put in the record that you  
16 have. It's been helpful to the Court. I'm of course very  
17 familiar with the record, as we have just made it, and familiar  
18 with the record of the case. I will offer you the opportunity  
19 if you'd like to take it to sum up with respect to good faith  
20 and any other open issues.

21 Debtor has the burden, you can go first.

22 MS. SCHWARTZ: Thank you, Judge. Going back to the  
23 debtor's initial case, in the affirmation in support of  
24 confirmation the debtor submits that its plan was proposed in  
25 good faith. With respect to the testimony that was taken this

1 evening regarding prior bankruptcy filing acts, we believe that  
2 those are not relevant to the analysis with respect to  
3 1129(a)(3) and we do submit that the plan was proposed in good  
4 faith, is in the best interests of all creditors, is fair and  
5 reasonable, and is feasible, and should be confirmed.

6 THE COURT: All right, and just to be clear, when you  
7 say prior bankruptcy filing act, you mean acts prior to the  
8 bankruptcy filing, as opposed to some prior bankruptcy filing?

9 MS. SCHWARTZ: Correct, Judge.

10 THE COURT: Thank you. All right, Ms. Kachan.

11 MS. KACHAN: Your Honor, it is our position that the  
12 plan was not -- has not been proposed in good faith and that  
13 further discovery is necessary in order to examine the  
14 discrepancies. The Second Circuit's standard for a test that's  
15 been proposed in good faith says that the good faith test means  
16 that the plan was proposed with honesty and good intentions.  
17 We propose, Your Honor, that neither honesty nor good  
18 intentions were present in certain acts of the debtor, the  
19 debtor's principal. Therefore that affected the amounts in the  
20 plan directly; therefore it affects whether the plan was  
21 proposed in good faith and further discovery is needed for that  
22 reason.

23 THE COURT: What case are you referring to when you  
24 quote the Second Circuit?

25 MS. KACHAN: It's Kane v. Johns-Manville Corp. --

1 Johns dash Manville Corp.

2 THE COURT: Could you give a citation?

3 MS. KACHAN: Yes. It's 843 F.2d 636, 649 --

4 THE COURT: All right.

5 MS. KACHAN: -- (2nd Cir. 1988)

6 THE COURT: And --

7 MS. KACHAN: And it's also quoting the second page.

8 THE COURT: You'll have to remind me, because I read  
9 your brief -- your objection, but I don't have at hand the  
10 page --

11 MS. KACHAN: Page --

12 THE COURT: -- with that reference.

13 MS. KACHAN: -- page 3.

14 THE COURT: Thank you. All right. Anything further?

15 MS. KACHAN: No, Your Honor.

16 THE COURT: All right. Anything -- any reply?

17 MS. SCHWARTZ: No, Judge.

18 THE COURT: No response. Any -- all right. Let's --

19 First of all, thank you again for your time and your  
20 arguments and the record you've made, in paper and with the  
21 testimony today and this evening. It's thorough, it's helpful.  
22 I'll say the ground that was covered was covered quite  
23 thoroughly. And so it gives me a significant level of comfort  
24 in the -- in ruling this evening with respect to the sole  
25 disputed issue on confirmation which is whether the requirement

1 of Section 1129(a)(3) that the plan be proposed in good faith  
2 and not by any means forbidden by law.

3 As the plain language of the section makes clear,  
4 there are two requirements built into Section 1129(a)(3), one  
5 positive and the other negative. The positive requirement is  
6 that plan has been proposed in good faith. The negative  
7 requirement is that the plan not have been proposed by any  
8 means forbidden by law. These complement and supplement each  
9 other, and I consider them both separately and together.

10 With respect to good faith, no less than authority  
11 than the Collier treatise tells us that good faith has served  
12 many functions in American bankruptcy law. I'll say that good  
13 faith informs and underlies everything that happens in this  
14 court and through these processes. Every matter that comes  
15 into this court does so with the presumption that is being  
16 undertaken in good faith. But that presumption can be upset,  
17 on the basis of an appropriate record. And it does take a  
18 record; it generally is not achieved with allegations,  
19 adjectives and adverbs, but with evidence. And you had the  
20 opportunity over the course of this case to become very  
21 familiar with the record, and this evening to focus, quite  
22 particularly over the last couple of hours, with respect to the  
23 evidence that the objector wished to put in the record with the  
24 respect to the positive and the negative components of the  
25 good-faith requirement.



1           The standard for good faith has been described in  
2       general ways by a number of courts. An often referenced source  
3       is the decision of the Second Circuit in *In re Madison Hotel*  
4       *Associates*, a case that has been widely cited, including within  
5       this circuit. And it describes one of the first, and in the  
6       view of some, one of the best statements as to what the  
7       yardstick of 1129(a)(3) requires.

8           The Second Circuit said, "Though the term good faith,  
9       as used in Section 1129(a)(3) is not defined in the Bankruptcy  
10      Code, the term is generally interpreted to mean that there  
11      exists a reasonable likelihood that the plan will achieve a  
12      result consistent with the objectives and purposes of the  
13      Bankruptcy Code. Thus for purposes of determining good faith  
14      under Section 1129(a)(3) the important point of inquiry is the  
15      plan itself and whether such plan will fairly achieve a result  
16      consistent with the objectives and purposes of the Bankruptcy  
17      Code." Continuing the quote, "According to the good-faith  
18      requirement of Section 1129(a)(3) the court looks to the  
19      debtor's plan and determines in light of the particular facts  
20      and circumstances whether the plan will fairly achieve a result  
21      consistent with the Bankruptcy Code. The plan must be viewed  
22      in the light of the totality of the circumstances surrounding  
23      confection of the plan, and the bankruptcy judge is in the best  
24      position to assess the good faith of the parties' proposals."

25           As the Collier treatise states, "Few cases since

1 Madison Hotel Associates have managed to add anything  
2 substantive to this description, and many courts have used  
3 these words and phrases, more or less, verbatim."

4           So in a general way, I think it's fair to say that we  
5 are reminded by Madison Hotel and by many, many, many, many,  
6 many other cases as well as the plain text of the Code that the  
7 point of this element is, first and last, the plan, and whether  
8 the plan was proposed in good faith, and whether the plan has  
9 been proposed by means not forbidden by law.

10           So I then turn locally to an interpretation by the  
11 Bankruptcy Court of the Southern District of New York in 1981  
12 in the Eden Associates case. There the court emphasized the  
13 importance of good faith and said, "Good faith, as the sine qua  
14 non for the filing and maintenance of a Chapter 11 case, should  
15 be proved elastically and on a case-by-case basis. To do  
16 otherwise invites unnecessary rigidity in bankruptcy  
17 administration, emasculating bright prospects of reorganization  
18 by slavish review of pre-petition dealings by debtors with  
19 their creditors."

20           That is to say again, the focus of the analysis under  
21 Section 1129(a)(3) is first and foremost, though of course not  
22 exclusively, the plan, the proposal of the plan, the debtor's  
23 conduct and the conduct of the parties-in-interest with respect  
24 to the plan.

25           So having that focus, but keeping in mind the big

1 picture as well, I turn to the record before me. And based on  
2 the entire record and the arguments of counsel, and paying  
3 close attention to the evidence this evening especially, and  
4 having allowed, and appropriately so, a wide berth with respect  
5 to admissible evidence by the objector because the process only  
6 benefits from a wide consideration of all the issues and  
7 potential issues, I'm satisfied that the debtor has carried its  
8 burden that the plan was proposed in good faith and not by any  
9 means forbidden by law.

10 I find the testimony of the debtor's principal to be  
11 both persuasive and credible. I am satisfied that the  
12 opportunity to cross-examine did not undermine in any  
13 meaningful way, or any way at all, the persuasiveness of the  
14 statements made initially in the affidavit and then in the  
15 proffer and then through live testimony to the effect that the  
16 debtor has indeed proposed this plan over the course of this  
17 case, through to the plan placed before the Court for  
18 confirmation this evening, in good faith, consistent with the  
19 purposes of the Bankruptcy Code and not by any means forbidden  
20 by law.

21 Taking at face value and assuming for purposes of,  
22 again, the most searching and thorough consideration of the  
23 possible issues that the objector has raised, I'm satisfied  
24 that the points of concern, first do not undermine the  
25 credibility of Mr. Pinson as the debtor's witness, and second

1 do not suggest, and certainly do not demonstrate, that the  
2 debtor has not carried its burden. And I note plainly that the  
3 burden is on the debtor with respect to the requirement that  
4 the plan be proposed in good faith and not by any means  
5 forbidden by law.

6 I say that based on the record on confirmation. I say  
7 that also based on the entire record of this case before this  
8 Court, where the Court has had, and this Judge has had a, in  
9 effect, a front row seat, with respect to the long path that  
10 has led us from the date of filing of this case to the point of  
11 confirmation today.

12 So I am satisfied based on the entire record that the  
13 objection with respect to Section 1129(a)(3) should be  
14 overruled, and it will be overruled, and I find that the debtor  
15 has demonstrated that the plan has been proposed in good faith  
16 and not by any means forbidden by law.

17 That brings me back to the questions of whether the  
18 requirements of cram-down have been met. The first is whether  
19 all other requirements of Section 1129(a) of the Bankruptcy  
20 Code are satisfied, and they are, or to the extent they are  
21 applicable, they are. And next, that at least one of impaired  
22 class of votes -- one impaired class votes to accept the plan  
23 without regard to any vote cast on account of the claim held by  
24 insiders. And here, too, the element satisfied.

25 And then finally, that as to a dissenting class, that

1 as to each dissenting class, that the plan does not  
2 discriminate unfairly, that is that the legal rights of that  
3 dissenting class are treated in a manner that is consistent  
4 with the treatment of other classes whose legal rights are  
5 intertwined with those of the nonaccepting class, and that no  
6 class receives payments in excess of what it is legally  
7 entitled to receive for its claims. And I am satisfied that  
8 that is the case here. And that the -- finally, that the plan  
9 is fair and equitable with respect to that dissenting class.

10 And this turns on, among other things, the absolute  
11 priority rule, requiring that an impaired class that has not  
12 accepted the plan must be paid in full before a more junior  
13 class can receive or retain any distribution under the plan.  
14 To the extent that is implicated here, I am satisfied that that  
15 requirement has been met.

16 So for all the reasons reflected in the record I am  
17 satisfied that each and all of the statutory requirements and  
18 other requirements for confirmation have been met. I am  
19 pleased to confirm this plan.

20 I appreciate the hard efforts of everyone to get us to  
21 this point. It hasn't always been -- hasn't ever been an easy  
22 case, but it's been a productive case. If I'm ruling in your  
23 favor, I'm sure you think this is a wise and insightful  
24 decision. If I'm ruling against you, I hope you appreciate  
25 that I have done my best to listen carefully to everything

1 you've said and be sure that I'm making a decision on the law  
2 before me, on the record before me, that is justified on the  
3 law and the facts.

4 So, I'm going to ask the debtor to submit an  
5 appropriate proposed order. I trust that need not be on the  
6 docket tonight in order to satisfy all the parties, and we'll  
7 do our darndest to get it up on the docket promptly.

8 Is there anything further, except I suspect we need to  
9 find an adjourn date for a continued status conference. Yes?

10 MS. SCHWARTZ: Judge?

11 THE COURT: Yes.

12 MS. SCHWARTZ: I hate to do this, but there is one  
13 other matter open and that is the claims objections with  
14 respect to Metropolitan and Wilk. We would --

15 THE COURT: It may be that we're not able to proceed  
16 with that this evening, in view of the lateness of the hour.

17 MS. SCHWARTZ: Understood.

18 THE COURT: Is that a nece --

19 MS. SCHWARTZ: I just didn't want it to remain an open  
20 issue. It does relate to --

21 THE COURT: It's a good reminder, and I appreciate  
22 that it informs a lot of the concerns that have been expressed  
23 here.

24 MS. SCHWARTZ: The claims that are on file, it does  
25 relate to the ability to make a distribution, and things of the

1 like. So they are -- they're matters that obviously dealing  
2 with them this evening is probably not the best scenario, but  
3 they do need to be addressed.

4 THE COURT: Of course they do. And they may be at  
5 least as important to the parties.

6 MS. SCHWARTZ: Correct.

7 THE COURT: It's a question of confirmation.

8 MS. SCHWARTZ: So that is something we need to  
9 consider and schedule as soon as practicable.

10 THE COURT: All right, we also have discovery motions,  
11 I think, that go to those claim objections. All right.

12 Having been quite focused the last few hours on the  
13 specific questions of confirmation, understanding that that is  
14 the context for the remaining issues, no less and no more than  
15 the context, I guess here's my question for the parties. Do we  
16 have a -- Ms. Jackson, do we have a next date scheduled? Or do  
17 we need to pick a date?

18 MS. SCHWARTZ: Today was the last date.

19 THE COURT: Okay, so we don't have any further dates.

20 MS. SCHWARTZ: So we need a new date.

21 THE COURT: All right, so, here's what I'm going to  
22 do. One moment.

23 I'm going to propose that you consider, as I'm  
24 considering, whether a referral to one of my colleagues for  
25 mediation on the issue of those claim objections would make

1 sense. You can spend a lot of time and money on litigating  
2 them. And as you can see, I'll take -- I'll do what I need to  
3 do whenever it needs to be done. But it seems to me,  
4 especially at this juncture in the case we now have a fairly  
5 discrete defined set of issues and it might make sense and I  
6 would be prepared to ask one of my colleagues to -- Judge Lord  
7 or Judge Craig -- to serve as a judicial mediator and try to  
8 bring this last issue to closure. What do you say?

9 MS. SCHWARTZ: Judge, conceptually I don't have an  
10 issue with it. I am more concerned with the timing aspect. I  
11 don't want mediating to be something that becomes a --

12 THE COURT: That delays it.

13 MS. SCHWARTZ: -- very lengthy, especially in light  
14 of the fact that there are other creditors involved whose  
15 distribution is going to be held up as a result --

16 THE COURT: Of course.

17 MS. SCHWARTZ: -- because this is a pro rata --

18 THE COURT: Understood.

19 MS. SCHWARTZ: -- scenario. If there is a way to  
20 schedule something with an outside deadline, perhaps that's  
21 something that would make the most sense, if Metropolitan  
22 obviously is amendable to that.

23 THE COURT: It can become somewhat difficult to  
24 schedule in the coming weeks because of the requirements of  
25 counsels' ancillary obligations, and those kinds of things.



1 Would the parties be available at some point -- do you have  
2 flexibility at some point in July if it turns out that one of  
3 my colleagues is available?

4 MS. SCHWARTZ: The debtor does, yes.

5 MS. KACHAN: Your Honor, I will be away between the  
6 dates of the -- I will be unavailable between the 16th and the  
7 22nd.

8 THE COURT: Okay. So it would have to be through the  
9 15th, or --

10 MS. KACHAN: From the 23rd.

11 THE COURT: -- after the 23rd. I'll give you a day to  
12 get adjusted after the 24th. Shall I inquire and we'll advise  
13 the parties?

14 MS. SCHWARTZ: Yes, Judge.

15 MS. KACHAN: Yes, Your Honor.

16 THE COURT: All right. I'm going to be an optimist  
17 and assume that that will work. And with respect to -- and  
18 you'll be advised. But it's -- I'm profoundly reluctant to say  
19 one of my colleagues, not only I would like you to take this --  
20 to consider taking on this mediation in this situation where it  
21 could be extremely helpful -- I understand the parties will  
22 make a sincere effort to resolve the matter through  
23 mediation -- but also, you got to schedule in the next few  
24 weeks because people are -- we are a busy court, as you can  
25 see.

1           Let me see what can be done. We know your scheduling  
2 issues, we'll note them. Any scheduling issues from the  
3 standpoint of the parties, from the bank and the debtor?

4           MS. SCHWARTZ: No.

5           THE COURT: It's okay, by the way, I'm -- all right.

6           All right, well let's get to work on that on our end.  
7 What other issues -- that, if that can be resolved that would  
8 take care of, obviously discovery issues. Let's get to work on  
9 that.

10           All right, so we'll come up with a date. As a holding  
11 date, I'm going to suggest August 2nd. Ms. Jackson, August 1st  
12 or 2nd.

13           THE CLERK: Not the 1st.

14           THE COURT: Not the 1st?

15           THE CLERK: The 1st is the adversaries. Yes.

16           THE COURT: August 2nd? As a holding in I'm going to  
17 propose August 2nd at 9 o'clock.

18           MR. FEUERSTEIN: Your Honor, I don't know if I'll even  
19 be involved in the process, but I do have a bankruptcy  
20 mediation on August 2nd.

21           THE COURT: Oh, okay. I hope it goes well. I'll --  
22 let's pick a different date. You say not August 1st.

23           THE CLERK: At 9? Okay, 9 o'clock, then.

24           THE COURT: Let's look at -- I don't need to be rigid  
25 about that. We've got a couple weeks, fine. It's not terribly

1 good for me. August 15th. Do you like that better? If we're  
2 going to give the wee -- if we're going to --

3 MR. FEUERSTEIN: That's when I'm going to be on  
4 vacation.

5 THE COURT: All right. That's all right. This is  
6 what happens this time of year though. It's terrible, just  
7 terrible. All right. We'll work on scheduling off the record.  
8 Let's go off the record. I don't want to see that roll over to  
9 9 o'clock.

10 (Whereupon these proceedings were concluded at 8:55 PM)

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## I N D E X

WITNESS	EXAMINATION BY	PAGE
Jacob Pinson	Ms. Kachan	38
Jacob Pinson	Ms. Schwartz	49
Alexander Dikman	Ms. Kachan	50
Alexander Dikman	Ms. Schwartz	64
Alexander Dikman	MS. Kachan	68
Jacob Pinson	Ms. Schwartz	71
Jacob Pinson	Ms. Kachan	72

## E X H I B I T S

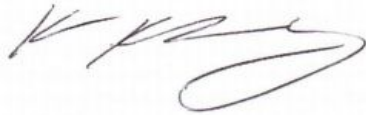
DEBTOR'S	DESCRIPTION	PAGE
	Ballot certification	9
	Confirmation affirmation	9

## RULINGS

	Page	Line
Objection with respect to Section 1129(a)(3)	84	14
overruled		
Plan of reorganization confirmed	85	19

## C E R T I F I C A T I O N

I, Keren Berkovitz, certify that the foregoing transcript is a true and accurate record of the proceedings.



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Date: July 22, 2013

	<b>7,18</b>	<b>9:23,25;89:18</b>	<b>along (5)</b>	<b>approvals (1)</b>
<b>#</b>	<b>actual (4)</b>	<b>affect (3)</b>	7:15;9:4;31:8;	30:12
<b>#607 (1)</b>	42:20;70:1;72:18;	56:5;62:17,18	42:11,12	<b>approve (1)</b>
5:22	74:16	<b>affected (3)</b>	<b>always (5)</b>	47:3
<b>A</b>	<b>actually (14)</b>	21:7;55:22;78:19	9:18;42:22;66:12;	<b>approved (9)</b>
	17:21;23:5,14,15;	<b>affects (3)</b>	75:8;85:21	9:9;11:20;29:22;
	26:16,22;28:18;39:1,	54:2;56:25;78:20	<b>amendable (1)</b>	30:4;47:5;48:25;
	17;54:10;65:9;66:5;	<b>affidavit (4)</b>	88:22	49:4;71:22,24
	68:19;76:17	11:24;30:20;36:23;	<b>amended (3)</b>	<b>Approximately (1)</b>
<b>abide (1)</b>	<b>add (1)</b>	83:14	11:20;36:11,12	63:12
16:8	82:1	<b>affidavits (1)</b>	<b>American (1)</b>	<b>April (1)</b>
<b>ability (1)</b>	<b>addition (2)</b>	23:17	80:12	11:19
86:25	18:8;19:8	<b>affirm (2)</b>	<b>among (1)</b>	<b>arbitrary (1)</b>
<b>able (8)</b>	<b>additional (15)</b>	36:24,25	85:10	7:18
17:18;18:19;32:19;	12:15;19:17,22,25;	<b>affirmation (9)</b>	<b>amount (17)</b>	<b>area (1)</b>
43:21;58:20;68:2,5;	20:1;23:15,19,21;	8:16;10:24;11:3,	12:21;23:4,5;	73:8
86:15	24:10,11;26:14,24;	13,19;13:22;14:3;	25:15;26:5,5,6,14;	<b>argue (1)</b>
<b>absence (1)</b>	44:22;45:7;75:3	49:11;77:23	39:14;40:24;61:22;	47:22
24:7	<b>additionally (1)</b>	<b>afternoon (7)</b>	64:21,25;71:20;	<b>argument (2)</b>
<b>absolute (1)</b>	23:7	6:6,8,11,24;7:4;	74:13,23,24	34:17,23
85:10	<b>address (3)</b>	17:6;21:15	<b>amounts (10)</b>	<b>arguments (3)</b>
<b>absolutely (10)</b>	34:7,14;35:23	<b>again (17)</b>	12:13;26:13;28:14;	20:8;79:20;83:2
33:21;34:25;35:3;	<b>addressed (3)</b>	16:22;28:11;29:25;	39:13,15;41:13,14;	<b>arrived (2)</b>
36:9;41:11,17;44:8;	31:4,19;87:3	32:13;37:17;48:21,	51:11;58:5;78:19	28:14;58:6
46:25;47:11;61:22	<b>addresses (1)</b>	25:55;16:60;1:8;	<b>analysis (4)</b>	<b>as-is (1)</b>
<b>accept (3)</b>	40:18	61:18;64:11;70:3;	30:21,25;78:2;	7:6
8:14;12:3;84:22	<b>adequate (1)</b>	71:15;79:19;82:20;	82:20	<b>aspect (3)</b>
<b>acceptance (1)</b>	40:15	83:22	<b>ancillary (1)</b>	65:25;73:25;88:10
30:22	<b>adequately (3)</b>	<b>against (1)</b>	88:25	<b>assert (1)</b>
<b>accepted (4)</b>	45:23;46:3,23	85:24	<b>and/or (1)</b>	38:9
11:16;31:6,8;85:12	<b>adjectives (1)</b>	<b>ago (8)</b>	58:25	<b>asserted (1)</b>
<b>accessible (1)</b>	80:19	63:15,16,19,20,21,	<b>answered (12)</b>	26:21
69:4	<b>adjourn (1)</b>	25;64:2;68:9	47:18;48:8;55:25;	<b>assess (1)</b>
<b>accordance (2)</b>	86:9	<b>agree (1)</b>	60:4;61:15;70:2,3;	81:24
39:25;45:8	<b>adjusted (1)</b>	19:12	73:14,16,24;74:2;	<b>assist (1)</b>
<b>according (3)</b>	89:12	<b>agreed (4)</b>	76:11	13:20
22:5;39:20;81:17	<b>adjustments (2)</b>	18:15;53:19;61:20;	<b>apartments (4)</b>	<b>Associates (3)</b>
<b>account (5)</b>	20:6;42:19	71:21	24:21;65:4,8,9	81:4;82:1,12
40:25;43:21;51:4;	<b>administration (1)</b>	<b>agreement (8)</b>	<b>apologize (1)</b>	<b>assume (1)</b>
61:25;84:23	82:17	13:15,17;17:16;	57:4	89:17
<b>accounted (2)</b>	<b>administrative (3)</b>	18:2;44:14,16;64:22;	<b>appears (1)</b>	<b>assuming (3)</b>
55:17;62:20	<b>administrator (1)</b>	71:15	26:11	14:24;23:20;83:21
<b>accrue (1)</b>	13:8	<b>agreements (3)</b>	<b>appliance (1)</b>	<b>assurance (1)</b>
20:25	<b>admissibility (1)</b>	39:21;45:9,10	42:18	31:15
<b>accuracy (1)</b>	52:24	<b>agrees (1)</b>	<b>applicable (8)</b>	<b>attach (1)</b>
55:3	<b>admissible (1)</b>	14:25	13:23;29:11,15,20;	24:1
<b>accurately (2)</b>	83:5	<b>Alexander (2)</b>	30:16;31:23;45:8;	<b>attached (1)</b>
52:10;58:20	<b>admitted (3)</b>	25:25;50:19	84:21	69:17
<b>achieve (3)</b>	11:5;23:8;53:15	<b>alike (1)</b>	<b>application (1)</b>	<b>attend (3)</b>
81:11,15,20	<b>advance (1)</b>	29:17	32:1	66:5,13,16
<b>achieved (1)</b>	41:23	<b>ALLA (3)</b>	<b>applied (3)</b>	<b>attending (1)</b>
80:18	<b>advanced (1)</b>	4:2,8;6:8	43:23;44:6;53:17	66:11
<b>Act (3)</b>	10:2	<b>allegations (2)</b>	<b>appreciate (7)</b>	<b>attention (1)</b>
32:2;57:19;78:7	<b>advancing (1)</b>	35:21;80:18	7:13;9:19;22:2;	83:3
<b>acting (1)</b>	10:3	<b>allow (1)</b>	60:8;85:20,24;86:21	<b>Attorney (8)</b>
18:5	<b>adverbs (1)</b>	15:4	<b>appropriate (8)</b>	4:3;47:2,5;62:3;
<b>action (1)</b>	80:19	<b>allowed (5)</b>	7:21;11:23;24:25;	72:21,22;75:6,9
43:15	<b>adversaries (1)</b>	12:12;31:3;44:12;	55:10;57:13;59:14;	<b>Attorneys (2)</b>
<b>active (1)</b>	90:15	58:11;83:4	80:17;86:5	4:12;5:3
8:5	<b>advise (2)</b>	<b>almost (1)</b>	<b>appropriately (4)</b>	<b>August (7)</b>
<b>actively (1)</b>	9:24;89:12	51:20	29:16;31:2,4;83:4	90:11,11,16,17,20,
8:25	<b>advised (3)</b>	<b>alone (1)</b>	<b>approval (3)</b>	22;91:1
<b>acts (6)</b>		20:24	30:3,5;71:19	<b>authority (3)</b>
35:23;58:5,7;78:1,				

13:18;14:10;80:10 <b>authorized (1)</b> 11:5 <b>automatically (1)</b> 39:12 <b>available (3)</b> 7:9;89:1,3 <b>Avenue (3)</b> 4:4,13;5:4 <b>avoid (1)</b> 48:22 <b>Avoidance (3)</b> 31:23,25;32:1 <b>avoiding (1)</b> 42:9 <b>await (1)</b> 61:1 <b>aware (9)</b> 8:25;28:4;36:10; 52:21;64:18;71:25; 72:2,22,24 <b>away (1)</b> 89:5	<b>basis (4)</b> 30:23;43:14;80:17; 82:15 <b>Bay (4)</b> 5:3;6:3,18;17:7 <b>Beach (1)</b> 4:4 <b>became (1)</b> 19:21 <b>become (4)</b> 7:3;13:16;80:20; 88:23 <b>becomes (1)</b> 88:11 <b>beforehand (1)</b> 71:24 <b>beg (1)</b> 35:19 <b>began (1)</b> 32:14 <b>begin (1)</b> 15:21 <b>beginning (4)</b> 22:25;29:10;32:20; 59:5 <b>begun (2)</b> 15:21;41:22 <b>behalf (3)</b> 6:9,12;21:10 <b>below (1)</b> 53:6 <b>benefit (2)</b> 12:24;15:2 <b>benefits (2)</b> 31:22;83:6 <b>Benten (1)</b> 26:22 <b>Berkovitz (1)</b> 5:20 <b>berth (1)</b> 83:4 <b>besides (3)</b> 43:17;53:16,16 <b>best (24)</b> 12:19;15:13,14,15; 16:5;26:3;30:17; 38:23;46:22;47:10; 11:51;17,22,22; 57:19;61:12,19,19; 75:15;78:4;81:6,23; 85:25;87:2 <b>better (3)</b> 56:22;68:3;91:1 <b>beyond (2)</b> 10:13,14 <b>big (1)</b> 82:25 <b>binding (1)</b> 13:18 <b>bit (1)</b> 21:5 <b>borrowed (4)</b> 39:13,16,18;44:6	<b>Both (5)</b> 8:14;11:5;20:6; 80:9;83:11 <b>bought (2)</b> 42:16;74:21 <b>boundary (2)</b> 46:16,16 <b>break (1)</b> 50:3 <b>Breakers (3)</b> 5:3;6:18;16:23 <b>brief (1)</b> 79:9 <b>bright (1)</b> 82:17 <b>Brighton (1)</b> 4:4 <b>bring (2)</b> 53:24;88:8 <b>brings (2)</b> 32:11;84:17 <b>broad (3)</b> 41:21,21;45:19 <b>broader (1)</b> 46:10 <b>Brog (1)</b> 6:7 <b>broken (1)</b> 8:7 <b>brokerage (2)</b> 26:12,14 <b>Brooklyn (1)</b> 4:6 <b>brought (3)</b> 48:15;54:3,10 <b>budget (1)</b> 21:4 <b>built (1)</b> 80:4 <b>burden (5)</b> 33:19;77:21;83:8; 84:2,3 <b>busy (1)</b> 89:24	<b>came (7)</b> 14:16;15:1;19:17; 22:24;23:1;42:13; 65:13 <b>can (44)</b> 9:24;15:17,19; 16:5,25;17:2;20:16; 22:9;24:8;25:7;29:1; 32:12,15;34:16; 35:10,21;36:19,24; 37:17;39:6;41:10,24; 46:14;52:25;53:1,23, 24;59:18;60:22;63:5; 64:7;65:1,24;71:14; 75:2;77:21;80:16; 85:13;88:1,2,23; 89:24;90:1,7 <b>care (2)</b> 31:19;90:8 <b>carefully (1)</b> 85:25 <b>carried (2)</b> 83:7;84:2 <b>case (25)</b> 9:4;11:25;15:8; 16:17;17:18;21:1; 29:13;32:21;42:10; 47:10;62:8;77:18,23; 78:23;80:20;81:4; 82:12,14;83:17;84:7, 10;85:8,22,22;88:4 <b>case-by-case (1)</b> 82:15 <b>cases (2)</b> 81:25;82:6 <b>cast (1)</b> 84:23 <b>causes (1)</b> 51:11 <b>central (1)</b> 9:14 <b>certain (6)</b> 48:17;54:12;58:12, 12;67:4;78:18 <b>certainly (5)</b> 15:7,13;21:12; 52:23;84:1 <b>certification (8)</b> 8:15;10:23;11:2, 11,16;14:4;29:24; 31:7 <b>chance (1)</b> 62:24 <b>change (2)</b> 17:23;18:10 <b>changed (1)</b> 16:16 <b>changes (1)</b> 30:14 <b>Chapter (2)</b> 25:17;82:14 <b>charges (1)</b> 20:23	<b>check (2)</b> 66:22;75:8 <b>checks (32)</b> 23:2,6,10,22;24:1, 8,12,12;26:15,24,24; 27:12,13;53:20,22, 22,24,25;61:21,22; 66:23,24;67:1,9; 68:21;69:8,13,16; 75:3,9,9,16 <b>Cir (1)</b> 79:5 <b>Circuit (4)</b> 78:24;81:3,5,8 <b>Circuit's (1)</b> 78:14 <b>circumstances (5)</b> 29:3;36:21;70:10; 81:20,22 <b>citation (1)</b> 79:2 <b>cited (1)</b> 81:4 <b>City (1)</b> 12:10 <b>claim (10)</b> 18:1;28:10;42:16, 17;43:12,13;44:1; 84:23;87:11,25 <b>claimants (1)</b> 13:11 <b>claimed (1)</b> 67:14 <b>claims (14)</b> 8:21;10:6;12:10, 10,11,13,21;31:1,3,3, 3;85:7;86:13,24 <b>claims-in-interest (1)</b> 29:16 <b>clarification (1)</b> 63:10 <b>clarify (2)</b> 54:19,21 <b>Class (18)</b> 11:16,17,18;13:3; 18:1;30:24;31:5,9; 84:22,22,25;85:1,3,5, 6,9,11,13 <b>classes (2)</b> 8:14;85:4 <b>classified (1)</b> 29:16 <b>clear (9)</b> 6:20;7:25;13:13, 18;26:18;33:21; 37:10;78:6;80:3 <b>cleared (1)</b> 26:6 <b>CLERK (10)</b> 6:2;17:7;37:24; 38:1;50:7,17;77:9; 90:13,15,23 <b>client (22)</b>
<b>B</b>				
<b>back (11)</b> 10:19;14:14,17; 15:1,18;18:20;19:4; 32:11;77:6,22;84:17 <b>background (1)</b> 19:12 <b>bad (3)</b> 35:23;38:10;40:4 <b>balance (1)</b> 20:5 <b>ballot (10)</b> 8:15,18,23;10:23; 11:2,11,15,23;14:3; 28:24 <b>ballots (5)</b> 8:12,14;12:3; 29:24;31:7 <b>bank (25)</b> 28:12;44:9;47:1,2, 3,4;48:16,17,25;49:1, 2;54:5,6,11;55:18; 71:15,16,18,19,21,22, 24,24;72:8;90:3 <b>Bankruptcy (20)</b> 13:24,25;29:9; 35:15;36:1;78:1,7,8, 8;80:12;81:9,13,16, 21,23;82:11,16; 83:19;84:19;90:19 <b>bank's (2)</b> 44:10,12 <b>Barring (1)</b> 13:25 <b>based (12)</b> 12:16;14:2;29:12, 17;30:23;44:11;49:3; 60:11;83:1;84:6,7,12				
		<b>C</b>		
		<b>calculated (4)</b> 51:3;55:17;58:9; 62:22 <b>calendar (4)</b> 6:2,25;7:12,21 <b>call (7)</b> 14:21;17:7;32:12; 34:20;49:20;53:15; 69:9 <b>called (6)</b> 23:3;36:5,24; 51:25;57:7;61:20 <b>calling (1)</b> 33:3 <b>calls (2)</b> 17:12;52:13		

14:10,13,17,21,23, 25:15:1,5,10,18;16:7, 13,13,16;19:21; 20:24;23:7;26:10; 49:18,21;75:12,12 <b>clients (15)</b> 15:15;20:20;21:6; 23:6,8;24:9,15; 25:19;27:4,10;28:9; 39:16,20;40:14; 43:14 <b>client's (3)</b> 14:16;16:14;22:1 <b>clos (1)</b> 27:16 <b>close (1)</b> 83:3 <b>closing (90)</b> 23:2;24:13,19,22; 26:6,7,9,11,15;27:16; 28:2,5,7;37:13; 38:25;39:1;40:1,2; 42:14,18,21;43:2,2; 46:2,3,22,24;47:1,5, 6,8,8,10;48:18,20,24; 49:2;51:3,18,19,25; 53:6,16;54:1,4,13,14, 15,16,17,17,22,23; 55:3;61:25;62:6,10, 13,14;67:14,15,23; 68:5;69:12,22,23; 70:1,1,5,12;71:20,23; 72:14,17,19,25;74:5, 12,14,15,16;75:4,17, 25;76:5,8,9,14,15,16 <b>closings (39)</b> 27:7,8;28:3,15; 35:22,22;38:11,24; 39:10,19;41:1,2,14, 15;42:8,13;46:4,22; 48:18,21,25;59:23; 65:5,6,18;66:2,5,12, 13,16;67:24,24;68:7; 71:19;72:3,4;73:3; 74:15;76:9 <b>closure (1)</b> 88:8 <b>Code (11)</b> 13:24,25;29:9; 35:15;81:10,13,17, 21;82:6;83:19;84:20 <b>colleagues (4)</b> 87:24;88:6;89:3,19 <b>Collier (2)</b> 80:11;81:25 <b>combine (1)</b> 65:9 <b>comfort (1)</b> 79:23 <b>coming (1)</b> 88:24 <b>commission (7)</b> 30:16;40:15;53:20, 21,22;65:17;66:20 <b>commissions (4)</b> 42:21;65:21;75:5,7 <b>committed (2)</b> 57:20;58:7 <b>common (1)</b> 20:23 <b>communicate (1)</b> 16:15 <b>company (3)</b> 28:4,6;62:12 <b>compel (2)</b> 8:19;22:20 <b>compensation (3)</b> 24:10;48:19,24 <b>complement (1)</b> 80:8 <b>complete (4)</b> 15:5;27:16;48:15; 57:3 <b>completed (1)</b> 18:23 <b>completion (1)</b> 71:17 <b>complied (3)</b> 9:1;29:20,22 <b>complies (4)</b> 13:23;29:11,15,23 <b>comply (1)</b> 45:9 <b>component (1)</b> 15:3 <b>components (1)</b> 80:24 <b>conceivably (1)</b> 46:17 <b>conceptually (1)</b> 88:9 <b>concern (1)</b> 83:24 <b>concerned (6)</b> 14:15,16,24;19:21; 67:25;88:10 <b>concerns (4)</b> 33:8,9;37:11;86:22 <b>conclude (1)</b> 27:24 <b>concluded (1)</b> 91:10 <b>concluding (1)</b> 32:9 <b>conclusion (1)</b> 40:19 <b>condo (3)</b> 15:7,8,11 <b>Condominium (9)</b> 5:3;6:19;12:17,25, 25;15:4;16:23;20:18; 21:3 <b>conduct (2)</b> 82:23,23 <b>confection (1)</b> 81:23 <b>confer (2)</b> 60:9;75:11 <b>conference (1)</b> 86:9 <b>confirm (8)</b> 14:22;16:15;17:13, 18;19:8,10;28:21; 85:19 <b>confirmation (51)</b> 7:1,6;8:10,16,19; 9:5,14;10:10,13,14, 18,20;11:3,6,13,18; 12:5;13:6,14,22;14:3, 6;16:19;18:21,23; 19:2,7;20:9,12,13,19; 21:8,21;25:7;29:6,8; 30:6,11;31:12;32:4, 10;34:9,16;77:24; 79:25;83:18;84:6,11; 85:18;87:7,13 <b>confirmed (8)</b> 14:2,17,21;16:12; 22:7;29:1;31:24;78:5 <b>confront (1)</b> 53:9 <b>connect (4)</b> 25:13;27:1;39:6; 45:2 <b>connected (1)</b> 45:23 <b>connection (18)</b> 20:4;21:5;25:14, 16;40:7,8,13,15;41:9, 15;45:2;46:4;58:5; 59:24;61:13;75:4,24; 76:4 <b>consent (4)</b> 43:19,20;44:22; 45:10 <b>consider (8)</b> 7:18;9:20;29:8; 41:8;80:9;87:9,23; 89:20 <b>consideration (4)</b> 20:1;51:4;83:6,22 <b>considered (5)</b> 8:24;41:11,13,19; 59:14 <b>considering (1)</b> 87:24 <b>consistent (6)</b> 36:6;81:12,16,21; 83:18;85:3 <b>construction (4)</b> 12:22;15:12;28:4,6 <b>consult (1)</b> 13:20 <b>consultant (1)</b> 18:5 <b>consulting (5)</b> 13:15,17;18:2,15; 19:24 <b>contact (1)</b> 53:6 <b>contacted (2)</b> 53:5,14 <b>contained (1)</b> 30:17 <b>contains (1)</b> 9:9 <b>contents (1)</b> 68:2 <b>contested (4)</b> 29:14;30:2;31:11, 11 <b>context (2)</b> 87:14,15 <b>continue (5)</b> 12:22;14:20;15:17; 41:24;52:25 <b>continued (1)</b> 86:9 <b>continuing (2)</b> 20:25;81:17 <b>contract (8)</b> 23:4;24:13;25:16; 39:1;42:13,14,21; 74:16 <b>contracted (1)</b> 26:5 <b>contractor (2)</b> 54:10;74:22 <b>contracts (2)</b> 24:4;42:23 <b>contributed (1)</b> 12:16 <b>control (1)</b> 46:25 <b>controlled (1)</b> 44:8 <b>controlling (1)</b> 21:24 <b>controversial (1)</b> 64:6 <b>conversation (1)</b> 64:12 <b>conversations (1)</b> 74:11 <b>copies (6)</b> 24:12;26:24;61:22; 66:24;67:9;70:7 <b>Corp (2)</b> 78:25;79:1 <b>corporate (2)</b> 45:8,9 <b>corporation (1)</b> 44:15 <b>costs (4)</b> 19:25;30:3,4;47:5 <b>counsel (15)</b> 6:23;13:8;16:22; 17:9;24:3,14;34:1; 36:20;39:18;54:25; 60:7,17,17;73:25; 83:2 <b>counsels' (1)</b> 88:25 <b>counsel's (2)</b> 37:2,2 <b>couple (6)</b> 49:25;63:14;68:8; 72:7;80:22;90:25 <b>course (20)</b> 21:22;23:8;28:3; 29:18;34:24;62:8; 64:23;65:3;67:13; 68:22;70:13;72:24; 76:10,17;77:16; 80:20;82:21;83:16; 87:4;88:16 <b>COURT (306)</b> 6:5,10,13,16,20; 7:2,9,12,19,20;8:1, 17;9:2,13,17,24;10:8, 12,15,17,21;11:7,10, 20;14:5,8,9,22;15:17, 20,25;16:3,5,6,9,10, 21,24;17:1,3,6,8,15, 25;18:7,13,18,24; 19:1,6,14,15;20:5,11, 15,17;21:5,13,17,20; 22:8,12,15;23:9,11, 13,16,20,24;24:6,15, 18,20,24;25:2,4,6,10, 12,22;26:2,10,18,19, 20;27:1,5,9,19,21,23; 29:2,4,5,19;30:5,14; 31:12,24;32:15,18, 24;33:1,3,5,8,11,14, 16,18,24;34:1,5,13, 15,20,23;35:4,7,9,12, 18;36:4,10,15,18; 37:5,8,15,18,22;38:3, 7,12,15,17,19;39:3,6; 40:5,19;41:4,8,12,15, 20;42:2,4,6,25;43:9, 15;44:2,5,18;45:1,14, 17,21,25;46:9,13,17, 20;47:16,18,21,24; 48:4,6,9;49:5,7,15, 17,20,23,25;50:3,9, 11,14,20;52:4,6,10, 18,21;53:2,4,12;55:5, 8,10;56:1,8,13,15,17, 19,21;57:2,9,11,13, 23,25;58:16,20,22; 59:4,9,13,18,21;60:5, 7,16,20,22,25;61:7, 11,16;63:4,6,8,16,19, 22,24;64:1,5,9,11,14; 65:24;66:3,10;67:15; 68:14,16;70:3,19,21, 25;71:2,4,6,8;72:11; 73:6,10,13,16,21,24; 75:14;76:21,23;77:3, 5,11,16;78:6,10,23; 79:2,4,6,8,12,14,16, 18;80:14,15;81:18; 82:11,12;83:17;84:8,
--



8;86:11,15,18,21; 87:4,7,10,19,21; 88:12,16,18,23;89:8, 11,16,24;90:5,14,16, 21,24;91:5 <b>Court-retained (1)</b> 13:7 <b>courtroom (3)</b> 6:4;11:1;36:16 <b>courts (2)</b> 81:2;82:2 <b>Court's (4)</b> 7:15;14:10;21:23; 32:6 <b>covered (3)</b> 46:10;79:22,22 <b>Craig (1)</b> 88:7 <b>cram-down (3)</b> 30:25;32:5;84:18 <b>credibility (1)</b> 83:25 <b>credible (1)</b> 83:11 <b>credit (2)</b> 62:21;74:23 <b>creditor (21)</b> 6:12;7:5;8:4;10:2; 11:17,18;12:12,14, 16,22;14:7;15:7; 17:17;19:11,25;20:8; 22:3;31:8;51:2; 62:21,22 <b>creditors (13)</b> 12:20;13:2;15:3, 16;30:17;31:9;39:16; 40:24;51:6;62:25; 78:4;82:19;88:14 <b>creditors' (5)</b> 7:10;10:4,7;43:12, 12 <b>creditor's (1)</b> 17:24 <b>credits (1)</b> 74:16 <b>cross (2)</b> 37:6,10 <b>cross- (2)</b> 37:9;63:8 <b>CROSS-EXAMINATION (2)</b> 38:21;64:16 <b>cross-examine (2)</b> 64:14;83:12 <b>crucial (1)</b> 22:21 <b>currently (2)</b> 9:21,23	86:7 <b>dash (1)</b> 79:1 <b>date (15)</b> 10:5;11:12,14; 12:3;18:3;64:10; 84:10;86:9;87:16,17, 18,20;90:10,11,22 <b>dates (2)</b> 87:19;89:6 <b>day (8)</b> 6:22;19:19;21:7,7; 34:5;75:10,10;89:11 <b>days (1)</b> 53:25 <b>deadline (3)</b> 8:11,13;88:20 <b>deadlines (3)</b> 9:1,1;10:11 <b>deal (7)</b> 24:22;26:6;48:17; 49:1,3,4;71:18 <b>dealing (1)</b> 87:1 <b>dealings (3)</b> 28:17,19;82:18 <b>debt (8)</b> 20:25;43:17;53:18; 54:5;55:18;58:9; 62:21,22 <b>debtor (50)</b> 6:7;8:4;9:1,2,11, 21;10:19,23;11:1; 12:19;13:6,8,23; 18:22;19:8;20:2; 22:3,9,21;27:15; 30:4;31:14;33:19; 34:13,15;36:1,2,2; 39:15;40:2,12;55:14; 57:2,3,14;67:2,5,12; 77:1,21,24;78:18; 83:7,16;84:2,3,14; 86:4;89:4;90:3 <b>debtors (1)</b> 82:18 <b>debtor's (33)</b> 6:23;7:1;8:6,22; 9:10;11:12,14,20; 12:14;17:8;24:3,14; 27:2;28:2;31:7;34:1; 36:5,14,20;37:2; 39:18;41:9;50:24; 54:25;55:20;56:23; 64:19;77:23;78:19; 81:19;82:22;83:10, 25 <b>decide (1)</b> 7:19 <b>decision (6)</b> 32:21,22;77:6; 81:3;85:24;86:1 <b>deemed (2)</b> 13:5;30:24	<b>deficiency (1)</b> 42:17 <b>deficient (1)</b> 22:20 <b>defined (2)</b> 81:9;88:5 <b>delays (1)</b> 88:12 <b>demand (11)</b> 24:10;68:21,24; 69:1,3,7,10,11,15,17; 70:7 <b>demand (2)</b> 53:17;67:19 <b>demanding (1)</b> 72:25 <b>demands (5)</b> 67:5;68:20;70:13; 72:24;73:2 <b>demonstrate (1)</b> 84:1 <b>demonstrated (1)</b> 84:15 <b>described (7)</b> 37:2,2,3;55:13; 56:4,5;81:1 <b>describes (1)</b> 81:5 <b>description (1)</b> 82:2 <b>desire (1)</b> 7:15 <b>detailed (1)</b> 69:10 <b>details (2)</b> 72:16;74:9 <b>determination (1)</b> 32:6 <b>determinations (1)</b> 21:23 <b>determine (1)</b> 29:19 <b>determines (1)</b> 81:19 <b>determining (2)</b> 32:7;81:13 <b>Development (1)</b> 6:3 <b>diff (1)</b> 42:13 <b>differed (1)</b> 26:7 <b>difference (8)</b> 53:20,21,25;54:1,2, 4;69:11;76:8 <b>differences (4)</b> 62:6,16,20;74:15 <b>different (20)</b> 9:7;16:15;23:5; 54:15;61:1,21,25; 62:9;64:11;67:14; 69:19;74:17,17,18; 75:5,16,17;76:12,13;	90:22 <b>difficult (1)</b> 88:23 <b>Dikman (26)</b> 26:1,18;33:4; 35:20;50:13,19,23, 23;55:20;57:19; 58:23;59:17;61:5,10; 63:2;64:18;68:19; 70:18;71:25;72:15; 74:12;75:4,5,17,24, 24 <b>D-I-K-M-A-N (1)</b> 50:19 <b>direct (3)</b> 49:19;50:21;73:19 <b>directed (3)</b> 40:11;59:10,10 <b>direction (2)</b> 16:12;34:21 <b>directly (3)</b> 21:7;25:15;78:20 <b>directors (2)</b> 30:7,8 <b>disclosed (1)</b> 19:15 <b>disclosure (12)</b> 9:8,9;11:20,21,22; 12:2;13:17;14:8; 30:7,21;36:11,12 <b>discovered (2)</b> 23:6;58:11 <b>discovery (23)</b> 8:20;10:16;22:19, 25;27:4,14;28:1,12, 12,20;33:9;58:11; 67:1,5,17;68:19; 69:1;70:13;76:17; 78:13,21;87:10;90:8 <b>discrepancies (8)</b> 55:13;56:4;58:24; 59:23;61:13;62:16; 76:15;78:14 <b>discrepancy (4)</b> 69:23;74:25;76:4,8 <b>discrete (1)</b> 88:5 <b>discriminate (1)</b> 85:2 <b>discuss (1)</b> 22:6 <b>discussed (3)</b> 37:14;69:8;74:6 <b>discussing (2)</b> 39:8;60:2 <b>dishonest (1)</b> 51:12 <b>dishonesty (1)</b> 51:13 <b>dispute (1)</b> 40:14 <b>disputed (4)</b> 34:8,9;40:20;79:25	<b>disrespect (1)</b> 16:6 <b>dissenting (4)</b> 84:25;85:1,3,9 <b>distributed (4)</b> 28:15,16,17;71:23 <b>distribution (4)</b> 12:12;85:13;86:25; 88:15 <b>District (1)</b> 82:11 <b>docket (3)</b> 11:25;86:6,7 <b>document (5)</b> 11:2,3,4;23:21; 67:22 <b>documentation (3)</b> 69:4,6;70:10 <b>documents (14)</b> 11:4,6,8;13:13; 22:18;23:1,19;24:4; 45:9,10;51:15;53:16; 58:12;68:1 <b>dollar (2)</b> 71:20;74:13 <b>dollars (23)</b> 9:22;13:2;18:9,10; 19:22;24:23;28:10, 11;43:13;44:11;45:6; 51:1,20;53:15,23; 54:17;62:13,23; 64:24;65:5,10,13; 66:4 <b>done (11)</b> 16:5;19:23;39:24; 43:20;70:21;74:18, 21;77:1;85:25;88:3; 90:1 <b>door (2)</b> 66:1;73:23 <b>dots (1)</b> 25:13 <b>down (3)</b> 8:7;52:1;64:25 <b>drafting (1)</b> 49:10 <b>drawing (1)</b> 41:21 <b>drill (1)</b> 19:2 <b>dropped (1)</b> 51:19 <b>during (3)</b> 28:3;38:11,24
<b>E</b>				
<b>D</b>				<b>earlier (2)</b> 71:11;74:14 <b>easy (1)</b> 85:21 <b>Eden (1)</b> 82:12
<b>damage (1)</b> 12:23 <b>darndest (1)</b>				

<b>effect (4)</b> 18:3;25:22;83:15; 84:9	<b>entire (7)</b> 29:12,17;33:20; 46:5;83:2;84:7,12	37:6;78:13	<b>facts (6)</b> 36:7;58:9;61:23; 65:1;81:19;86:3	27:4;32:21
<b>effective (2)</b> 10:5;18:3	<b>entirely (2)</b> 18:4;35:25	<b>examined (1)</b> 63:9	<b>fair (6)</b> 15:2;21:11,12; 78:4;82:4;85:9	<b>FEUERSTEIN (20)</b> 4:11,17;6:11,12; 14:7;15:23;16:1,4,6; 17:13;19:9,10,15; 20:7;26:17;57:21; 73:5,18;90:18;91:3
<b>efficiently (1)</b> 27:21	<b>entitled (2)</b> 18:5;85:7	<b>example (2)</b> 27:7;51:18	<b>fairly (4)</b> 46:14;81:15,20; 88:4	<b>few (4)</b> 53:25;81:25;87:12; 89:23
<b>effort (1)</b> 89:22	<b>entity (1)</b> 75:6	<b>excess (1)</b> 85:6	<b>faith (70)</b> 22:7,12;23:20; 24:7;25:9,10,14,18; 27:2;28:16,23,25; 32:7,11;33:12;34:2, 10;35:16,25;36:13, 22;37:19;38:10;39:5, 9;40:4,8,12,16,21; 45:13,16,18;46:8; 49:12;50:24;51:9; 54:2;55:15,23;56:16, 20;57:15;59:24; 62:19;65:23;77:19, 25;78:4,12,15,15,21; 80:1,6,10,11,13,16; 81:1,8,13,24;82:8,13, 13;83:8,18;84:4,15	<b>file (4)</b> 7:6;8:18;12:18; 86:24
<b>efforts (2)</b> 18:20;85:20	<b>episodes (1)</b> 60:1	<b>exclusively (1)</b> 82:22	<b>false (1)</b> 40:3	<b>filings (8)</b> 7:10;12:4;78:1,7,8, 8;82:14;84:10
<b>eight (1)</b> 64:4	<b>equitable (3)</b> 15:2,5;85:9	<b>Excuse (3)</b> 16:24;31:23;56:23	<b>familiar (4)</b> 47:12;77:17,17; 80:21	<b>final (1)</b> 49:23
<b>eighth (1)</b> 73:7	<b>equity (2)</b> 13:3,4	<b>excused (3)</b> 50:5;70:25;76:23	<b>families (1)</b> 20:22	<b>finalize (1)</b> 48:15
<b>eighty (1)</b> 39:17	<b>eScribers (1)</b> 5:21	<b>Exhibit (2)</b> 11:12,14	<b>far (5)</b> 14:24;15:8;22:19; 42:9;75:2	<b>finally (2)</b> 84:25;85:8
<b>either (1)</b> 30:4	<b>Especialty (4)</b> 6:21;83:3;88:4,13	<b>exhibits (1)</b> 76:18	<b>fast (2)</b> 15:21,22	<b>financed (1)</b> 43:22
<b>elastically (1)</b> 82:15	<b>ESQ (2)</b> 4:8,17	<b>exists (1)</b> 81:11	<b>favor (2)</b> 16:18;85:23	<b>financial (2)</b> 27:16;31:13
<b>electronic (1)</b> 11:25	<b>established (1)</b> 57:14	<b>expenses (8)</b> 30:3;41:2,15;46:4, 23;47:2,6,9	<b>feasibility (2)</b> 9:12;31:10	<b>financials (1)</b> 28:3
<b>element (7)</b> 25:7;29:6;30:6,11; 34:9;82:7;84:24	<b>estate (2)</b> 12:20;13:7	<b>expert (3)</b> 56:17;57:6;59:10	<b>feasible (2)</b> 8:8;78:5	<b>financing (5)</b> 36:2;44:17,21,22; 45:7
<b>elements (2)</b> 10:20;29:8	<b>Estates (2)</b> 4:3;50:13	<b>explain (4)</b> 27:18,19;69:11; 71:14	<b>February (1)</b> 64:2	<b>find (4)</b> 31:12;83:10;84:14; 86:9
<b>else (3)</b> 9:15;16:18;61:2	<b>estimate (2)</b> 20:23;47:25	<b>explaining (1)</b> 27:6	<b>fee (2)</b> 19:24;26:14	<b>finding (1)</b> 29:18
<b>elsewhere (1)</b> 76:18	<b>even (4)</b> 22:21;46:16;52:24; 90:18	<b>explanation (2)</b> 68:21;69:8	<b>feel (8)</b> 9:2;22:5;32:13; 55:13,22;56:4,5; 59:24	<b>finds (1)</b> 31:25
<b>emasculating (1)</b> 82:17	<b>evening (16)</b> 8:17;17:11;21:15, 17;50:23;57:4;58:17; 77:13;78:1;79:21,24; 80:21;83:3,18;86:16; 87:2	<b>explore (1)</b> 73:10	<b>feels (2)</b> 7:14;56:24	<b>fine (2)</b> 42:4;90:25
<b>Emmons (2)</b> 4:12;6:12	<b>event (1)</b> 18:8	<b>expressed (1)</b> 86:22	<b>fees (11)</b> 9:22;10:1,6,7; 15:11;18:6,15;26:13; 30:3;31:17,20	<b>finish (2)</b> 53:1;71:16
<b>Emmons' (1)</b> 18:1	<b>everyone (2)</b> 7:14;85:20	<b>extent (7)</b> 17:17;30:10;52:13, 22;74:13;84:20; 85:14	<b>felt (2)</b>	<b>fire (1)</b> 19:2
<b>Emmons-Sheepshead (2)</b> 6:3;17:7	<b>everyone's (1)</b> 32:19	<b>extinguished (1)</b> 13:5		<b>first (23)</b> 9:17;10:12;25:23; 32:12,24;33:1,2,18; 34:20;55:2;56:22; 62:2;64:22;67:21; 69:1;77:12,21;79:19; 81:5;82:7,21;83:24; 84:18
<b>emphasize (2)</b> 60:10;61:18	<b>evidence (19)</b> 11:5,11,13;23:3,11, 18,25;24:6;26:15; 27:11,13,13;28:18; 33:6;34:18;80:19,23; 83:3,5	<b>extremely (1)</b> 89:21		<b>five (3)</b> 14:21;15:25;16:3
<b>emphasized (1)</b> 82:12	<b>evidencing (1)</b> 26:24			<b>flexibility (1)</b> 89:2
<b>employed (1)</b> 30:8	<b>exact (2)</b> 51:20;64:24	<b>F</b>		
<b>enable (1)</b> 15:6	<b>exactly (1)</b> 19:11	<b>F2d (1)</b> 79:3		
<b>encourage (4)</b> 34:25;40:10,18; 73:10	<b>examination (7)</b> 37:10,10;49:8; 50:21;68:17;71:9; 73:19	<b>face (1)</b> 83:21		
<b>end (2)</b> 72:6;90:6	<b>examinations (1)</b> 22:18	<b>fact (19)</b> 15:3;17:20;27:23; 29:13;40:3;43:17; 45:19;47:8,9;52:16; 56:8,21,24;57:7; 59:10,11,14;69:1; 88:14		
<b>ended (1)</b> 74:22	<b>examine (2)</b>	<b>factor (2)</b> 22:24;27:17		
<b>engaged (1)</b> 8:25		<b>factors (2)</b> 22:5;32:23		
<b>enquired (1)</b> 60:7				
<b>entered (1)</b> 11:19				
<b>Enterprises (1)</b> 10:25				

<b>flooding (1)</b> 14:12	28:17,19	<b>Good (83)</b> 6:6,8,11,21,24; 17:6;21:15,15,17; 22:6,12;23:20;24:7; 25:9,10,13,18,27;2; 28:16,23,25;32:7,11; 33:12;34:2,10;35:9, 16,25;36:13,22; 37:19;39:4,9;40:8,12, 16,20;45:13,16,17; 46:8;49:12;50:23,24; 51:9;54:2,55:15,23; 56:16,20;57:15; 59:24;62:19;65:23; 77:19,25;78:3,12,15, 15,16,17,21;80:1,6, 10,11,12,16;81:1,8, 13,24;82:8,13,13; 83:8,18;84:4,15; 86:21;91:1	18;14:5;16:25;17:2, 8;19:1,7;20:16; 21:20;33:16;34:3	81:3;82:1,5
<b>Floor (2)</b> 4:5;5:5	<b>front (1)</b> 84:9			<b>hour (5)</b> 6:22;27:23;34:24; 57:3;86:16
<b>flow (1)</b> 52:15	<b>full (3)</b> 31:20;77:14;85:12		<b>heard (8)</b> 9:15;16:18;31:21; 33:8,8;36:20;61:23; 62:5	<b>hours (3)</b> 19:16;80:22;87:12
<b>focus (3)</b> 80:21;82:20,25	<b>fully (1)</b> 28:25		<b>hearing (7)</b> 7:1;12:5;14:3; 15:21,22;27:24; 77:13	<b>hundred (1)</b> 42:22
<b>focused (1)</b> 87:12	<b>fun (1)</b> 15:11		<b>hearsay (6)</b> 52:2,12,13,14,16, 23	<b>hundreds (2)</b> 43:3,6
<b>focusing (1)</b> 73:24	<b>functions (1)</b> 80:12		<b>held (3)</b> 9:23;84:23;88:15	<b>Hurricane (2)</b> 12:24;19:19
<b>follow (1)</b> 16:9	<b>fund (8)</b> 10:7;12:12,16; 13:2;17:17;48:16,18; 71:17		<b>help (3)</b> 15:7;25:13;48:15	<b>I</b>
<b>followed (1)</b> 31:13	<b>funded (1)</b> 12:13		<b>helpful (5)</b> 29:5;32:18;77:16; 79:21;89:21	<b>idea (5)</b> 7:17;42:10,23; 47:16;51:4
<b>following (2)</b> 32:8;66:2	<b>funding (11)</b> 7:7;12:11,22; 14:15,18,23;15:11, 12;45:4,5;72:2		<b>helps (1)</b> 40:19	<b>identified (1)</b> 58:24
<b>forbidden (14)</b> 22:13;35:17;36:23; 37:20;40:12;45:18; 57:16;80:2,8;82:9; 83:9,19;84:5,16	<b>funds (4)</b> 10:4;12:15;39:10; 71:16	<b>good-faith (3)</b> 37:16;80:25;81:17	<b>hereby (2)</b> 11:11,13	<b>illegally (1)</b> 39:21
<b>forced (1)</b> 15:10	<b>further (25)</b> 9:5;12:14;24:3; 27:11;31:13;43:9; 45:6,24;49:5;63:3; 68:15;70:18;71:4,9; 72:9,12;76:20,21,22, 25;78:13,21;79:14; 86:8;87:19	<b>government (1)</b> 30:15	<b>here's (4)</b> 25:6;34:6;87:15,21	<b>imagine (1)</b> 65:12
<b>foreclose (2)</b> 15:10,16		<b>granted (1)</b> 58:14	<b>himself (1)</b> 74:22	<b>immediacy (2)</b> 22:2,4
<b>foreclosure (1)</b> 14:20		<b>grateful (2)</b> 7:22;18:20	<b>holders (2)</b> 12:12;13:4	<b>impaired (9)</b> 11:17;13:3;31:5,8, 9;58:16;84:21,22; 85:11
<b>foremost (1)</b> 82:21		<b>ground (1)</b> 79:22	<b>holding (2)</b> 90:10,16	<b>impediment (1)</b> 32:3
<b>forgoing (1)</b> 55:22	<b>furtherance (1)</b> 22:16	<b>grounds (6)</b> 29:18;39:3;40:6; 41:5;56:9;74:1	<b>hole (2)</b> 19:20,20	<b>imperfect (1)</b> 21:6
<b>form (4)</b> 13:12;25:19;40:19; 41:25	<b>G</b>	<b>Group (1)</b> 8:18	<b>home (1)</b> 20:22	<b>implicated (3)</b> 30:10,13;85:14
<b>formal (1)</b> 33:22	<b>GANFER (2)</b> 5:2;6:18	<b>guarantee (3)</b> 18:11,16;20:3	<b>honesty (3)</b> 51:8;78:16,17	<b>importance (2)</b> 9:21;82:13
<b>formulating (2)</b> 40:23,23	<b>gave (2)</b> 63:11;67:19	<b>guaranteed (1)</b> 13:2	<b>Honor (74)</b> 6:8,11,17;9:16,20; 10:10,11;11:9;12:8; 14:1,7;15:23;16:2, 20;19:5,10;20:14; 21:12,16,19,25; 22:14;23:19;25:1; 26:17;27:3,17;28:23; 32:13,20;33:17;35:3; 37:7,14,21;38:6,14; 39:8;43:25;45:24; 46:7,12;47:17;49:6, 16;50:12;52:3,20; 56:12;58:2;59:3; 60:19;61:4;63:3,14, 20;64:3;65:22;66:7; 70:20;71:3,5;72:10; 73:18,22;75:11,22; 77:4;78:11,17;79:15; 89:5,15;90:18	<b>important (4)</b> 15:3;77:14;81:14; 87:5
<b>forth (12)</b> 9:2,6;11:15,18; 13:4,10,22;22:3; 28:24;30:9,20;40:6	<b>general (10)</b> 7:16;15:14;42:1; 59:9,13;62:9;69:3,9; 81:2;82:4	<b>guess (2)</b> 32:8;87:15		<b>importantly (2)</b> 7:1;22:4
<b>forum (1)</b> 7:17	<b>generally (3)</b> 59:13;80:18;81:10	<b>H</b>		<b>impossible (1)</b> 51:7
<b>forward (4)</b> 8:9;13:9;14:16; 46:15	<b>gentlemen (1)</b> 47:12	<b>hallway (2)</b> 17:12;34:7		<b>inappropriately (1)</b> 7:20
<b>four (2)</b> 31:9;68:9	<b>given (3)</b> 45:19;74:17,23	<b>hand (1)</b> 79:9		<b>Inc (1)</b> 4:3
<b>fracture (2)</b> 58:10;62:25	<b>gives (1)</b> 79:23	<b>hands (4)</b> 13:6,14;67:22,25		<b>includes (1)</b> 10:3
<b>frame (1)</b> 60:13	<b>giving (1)</b> 18:14	<b>happen (2)</b> 47:1;54:6		<b>including (6)</b> 12:10;13:24;16:13; 29:24;30:19;81:4
<b>Frankel (5)</b> 54:14;62:4,7,11; 70:8	<b>glad (1)</b> 77:14	<b>happened (4)</b> 19:13;46:11;47:6; 74:21		<b>inconsistency (1)</b> 41:13
<b>Frankel's (1)</b> 68:9	<b>goes (7)</b> 17:21;47:17,19; 52:23;56:16,20; 90:21	<b>happens (2)</b> 80:13;91:6		<b>incorrect (1)</b> 13:12
<b>frankly (1)</b> 8:24	<b>going-forward (2)</b> 13:16,20	<b>hard (2)</b> 65:12;85:20		<b>incurred (4)</b> 43:17,18;45:6,7
<b>fraudulent (2)</b>		<b>hate (1)</b> 86:12	<b>hope (4)</b> 17:13;46:13;85:24; 90:21	<b>incurring (2)</b> 44:17;45:5
		<b>hear (15)</b> 6:20,23;7:24;9:17,	<b>Hotel (3)</b>	<b>indeed (4)</b>

28:22;31:13;39:22; 83:16 <b>independent (2)</b> 49:1;71:18 <b>independently (1)</b> 48:17 <b>indicate (2)</b> 23:10;44:19 <b>indicated (8)</b> 21:9;23:4,6;25:6, 12,18;36:20;45:18 <b>indicates (2)</b> 13:11;31:7 <b>indirectly (1)</b> 25:15 <b>indiscernible (15)</b> 20:23,24,25;21:1,2, 2,3,3;39:12,14,18; 41:13;44:1;47:20; 54:21 <b>individual (4)</b> 42:15,16;71:12; 74:21 <b>indulging (1)</b> 17:11 <b>inflate (1)</b> 51:5 <b>inflated (1)</b> 51:2 <b>information (5)</b> 58:10,15;64:7; 69:3;70:5 <b>informed (4)</b> 25:14;28:25;53:5; 73:2 <b>informs (2)</b> 80:13;86:22 <b>initial (2)</b> 28:12;77:23 <b>initially (2)</b> 27:3;83:14 <b>inquire (4)</b> 38:5,7;50:20;89:12 <b>inquiry (2)</b> 41:22;81:14 <b>insiders (2)</b> 30:8;84:24 <b>insightful (1)</b> 85:23 <b>instance (5)</b> 27:11,14;28:8; 33:18;51:12 <b>instances (1)</b> 27:12 <b>intent (1)</b> 42:11 <b>intention (1)</b> 14:9 <b>intentions (2)</b> 78:16,18 <b>interest (5)</b> 14:18,19;15:15; 30:17;40:6	<b>interested (1)</b> 14:23 <b>interests (4)</b> 12:19;15:13,14; 78:4 <b>interposed (2)</b> 52:11,12 <b>interpretation (1)</b> 82:10 <b>interpreted (1)</b> 81:10 <b>interrupt (1)</b> 53:12 <b>intertwined (1)</b> 85:5 <b>into (10)</b> 11:5,11,13;14:19; 17:11;18:2;19:22; 40:25;80:4,15 <b>inures (1)</b> 12:24 <b>invest (1)</b> 16:7 <b>invested (1)</b> 71:16 <b>investment (1)</b> 71:21 <b>investors (6)</b> 14:14,14,16;15:19; 16:7,8 <b>invite (2)</b> 10:19;24:6 <b>invites (1)</b> 82:16 <b>invoked (1)</b> 7:23 <b>involved (4)</b> 51:13;72:4;88:14; 90:19 <b>Irrelevant (1)</b> 66:9 <b>IRS (1)</b> 39:11 <b>issue (12)</b> 13:9;31:11;32:3; 40:20;45:15,23; 46:17;79:25;86:20; 87:25;88:8,10 <b>issued (1)</b> 75:16 <b>issues (13)</b> 13:19;14:12;20:20; 77:20;83:6,7,23; 87:14;88:5;90:2,2,7,8 <b>issuing (1)</b> 75:3	38:2 <b>Jeffery (1)</b> 13:7 <b>JEROLD (2)</b> 4:17;6:11 <b>Johns (1)</b> 79:1 <b>Johns-Manville (1)</b> 78:25 <b>Judge (39)</b> 6:6,24,25;7:24;8:2, 22;9:5;10:22,23; 11:15;12:7,18;13:3, 22;17:10;18:22;34:3, 12;35:6,11,14;36:9; 46:5;64:15;68:13,15; 71:7;72:9;76:22; 77:22;78:9;79:17; 81:23;84:8;86:10; 88:6,7,9;89:14 <b>judicial (2)</b> 7:17;88:7 <b>July (1)</b> 89:2 <b>juncture (3)</b> 8:9,24;88:4 <b>June (3)</b> 8:12,17;12:2 <b>junior (1)</b> 85:12 <b>jurisdiction (1)</b> 30:15 <b>justified (1)</b> 86:2	59:2,7,12,16,20,22; 60:6;61:2,4,9;63:2, 20,22,23;65:22,25; 66:1,7,9;67:7;68:18; 70:18,20;71:5;72:10, 13;73:6,9,12,15,22; 74:4;75:11,21;76:20; 77:4,8;78:10,11,25; 79:3,5,7,11,13,15; 89:5,10,15 <b>Kane (1)</b> 78:25 <b>keeping (1)</b> 82:25 <b>Keren (1)</b> 5:20 <b>kind (2)</b> 55:8;70:10 <b>kinds (1)</b> 88:25 <b>knew (1)</b> 72:16 <b>knowledge (15)</b> 26:4;38:23;46:23; 47:10,11;51:22;52:7, 9;55:21;57:19;58:7, 24;60:11;61:12,19 <b>knows (1)</b> 10:11 <b>KRISS (1)</b> 4:11	62:1,2;67:20;69:2; 70:9 <b>lawyers (1)</b> 70:21 <b>learn (1)</b> 51:24 <b>learned (3)</b> 26:16;27:10,18 <b>least (9)</b> 19:24;23:1;62:25; 63:19,20,21,25; 84:21;87:5 <b>led (1)</b> 84:10 <b>legal (3)</b> 56:17;85:2,4 <b>legally (1)</b> 85:6 <b>lender (2)</b> 36:2,3 <b>lengthy (1)</b> 88:13 <b>less (5)</b> 18:9;62:23;80:10; 82:3;87:14 <b>level (1)</b> 79:23 <b>Lexington (2)</b> 4:13;5:4 <b>lifted (1)</b> 7:10 <b>light (6)</b> 19:17;22:24;23:1; 81:19,22;88:13 <b>likelihood (1)</b> 81:11 <b>likely (2)</b> 31:12;57:13 <b>limit (1)</b> 7:19 <b>limited (1)</b> 37:11 <b>line (3)</b> 42:12;46:5;62:10 <b>liquidation (2)</b> 30:21;31:13 <b>listen (2)</b> 60:12;85:25 <b>litigating (1)</b> 88:1 <b>litigation (3)</b> 72:25;76:10,18 <b>live (1)</b> 83:15 <b>living (1)</b> 13:1 <b>LLC (5)</b> 4:12;5:21;6:12; 44:15,23 <b>LLP (2)</b> 4:11;5:2 <b>loan (1)</b> 18:11
				<b>L</b>
		<b>K</b>	<b>language (1)</b> 80:3 <b>last (11)</b> 8:17;12:3;19:16; 34:4;38:1;48:2; 80:22;82:7;87:12,18; 88:8 <b>late (5)</b> 6:22;17:11;34:24; 57:3;59:3 <b>lateness (1)</b> 86:16 <b>later (4)</b> 23:7;53:25;72:8; 75:10 <b>LAW (25)</b> 4:2;22:13;33:14; 34:11;35:17;36:23; 37:20;39:9,24,25; 40:13;45:18;57:6,16, 20;80:2,8,12;82:9; 83:9,20;84:5,16;86:1, 3 <b>lawful (3)</b> 41:1;55:23;56:25 <b>lawfulness (2)</b> 56:6,11 <b>lawyer (8)</b> 42:4;47:20;54:13;	
		<b>KACHAN (188)</b> 4:2,8;6:8,8;9:6,16, 19;10:8,9,14,16;11:9; 12:8;17:21;21:13,15, 18,25;22:11,14,16; 23:10,12,13,14,19, 21;24:1,8,17,19,21, 24;25:1,3,5,9,11,21, 25;26:3,11,22;27:3,5, 6,10,20,22,25;29:3; 32:12,13,17,20,24, 25;33:2,4,6,7,10,13, 15,17,23,25;34:19, 22;35:3,10,19;37:7, 13,21;38:4,6,8,12,14, 16,18,20,22;39:8; 40:22;42:25;43:10, 25;44:4;45:14,16,20, 24;46:1,7,12,21; 47:17,19,23;48:2,5,7, 10,11;49:6,16,18,22, 24;50:2,9,10,12,22; 52:3,5,17;53:7,12; 55:7,9,12;56:3,12,14, 16,18,20,21;57:1,8, 10,12,18,24;58:2,4;		
	<b>J</b>			
	<b>Jackson (3)</b> 50:14;87:16;90:11 <b>Jacob (4)</b> 10:24;13:11;37:25;			

<b>locally (1)</b> 82:10 <b>Lockshen (21)</b> 47:13;48:12,14,15, 16,19,25;49:2;54:8,9, 11,17;55:16,18; 62:11,13;71:12,14, 15;72:1,4 <b>long (6)</b> 6:22;7:21;21:25; 34:5;77:13;84:9 <b>longer (4)</b> 18:3,5,5;47:25 <b>look (4)</b> 48:21;58:12;77:6; 90:24 <b>looks (1)</b> 81:18 <b>Lord (1)</b> 88:6 <b>Lori (1)</b> 6:6 <b>losing (1)</b> 34:5 <b>lot (8)</b> 17:12;63:11,11; 72:7;74:20;76:1; 86:22;88:1 <b>loud (3)</b> 6:20,21;7:24 <b>lower (1)</b> 20:2	1,4;74:15;80:12; 82:2,5,5,5,5,6 <b>marketing (1)</b> 13:20 <b>Martin (4)</b> 6:14,14;9:17,20 <b>Marylou (1)</b> 6:14 <b>matter (12)</b> 7:3;8:20;9:20; 17:20;26:21;30:13; 45:23;57:7;69:1; 80:14;86:13;89:22 <b>matters (7)</b> 6:3,25;7:22;29:13; 30:15;36:5;87:1 <b>matter's (1)</b> 7:12 <b>may (41)</b> 8:17;9:17;12:15; 19:7;31:24;33:24; 34:7;37:13;38:4,7,9, 14;39:19;40:14,17; 42:20;46:9,17;49:19, 25;50:20;53:2;54:3; 55:11;57:17,20;59:7; 60:12,21,24;61:17; 64:14;68:13;72:10; 73:7,13,18;75:11,12; 86:15;87:4 <b>Maybe (8)</b> 32:15;63:15,15,17; 65:3;68:9,11;75:9 <b>Mazarisi (2)</b> 62:1;67:20 <b>mean (6)</b> 8:4;14:24,25;42:7; 78:7;81:10 <b>meaning (1)</b> 23:4 <b>meaningful (1)</b> 83:13 <b>means (17)</b> 22:13;33:14;34:10; 35:16;36:22;37:20; 40:12;45:18;57:16; 78:15;80:2,8;82:9; 83:9,19;84:4,16 <b>mediating (1)</b> 88:11 <b>mediation (4)</b> 87:25;89:20,23; 90:20 <b>mediator (1)</b> 88:7 <b>medication (1)</b> 58:17 <b>member (1)</b> 10:25 <b>members (3)</b> 44:15,23;45:11 <b>memory (1)</b> 51:23	<b>mentioned (2)</b> 20:19;71:25 <b>met (9)</b> 30:19;31:16;32:7, 10;54:9;72:1;84:18; 85:15,18 <b>Metropolitan (13)</b> 4:3;6:9;8:4,18,25; 13:11;50:13;65:15, 17,20;67:4;86:14; 88:21 <b>microphone (1)</b> 36:19 <b>might (2)</b> 7:18;88:5 <b>million (13)</b> 18:9,10;28:10,11; 43:13;44:11;45:6; 55:18;62:23;64:24; 65:5,10,13 <b>millions (2)</b> 51:1,1 <b>mind (3)</b> 60:14;74:19;82:25 <b>mindful (1)</b> 73:13 <b>minute (4)</b> 34:6;35:5;49:18; 77:5 <b>minutes (1)</b> 50:1 <b>misreading (1)</b> 9:10 <b>misspeaking (1)</b> 57:5 <b>mistaken (1)</b> 53:23 <b>modification (2)</b> 17:18,19 <b>modifications (1)</b> 30:9 <b>modified (1)</b> 36:10 <b>moment (9)</b> 9:13;17:3;30:1,25; 32:8;59:4;68:13; 74:7;87:22 <b>Monday (1)</b> 8:17 <b>money (20)</b> 9:23;10:1;14:19; 23:3;24:18;39:18,19, 21,22;45:6;51:6; 53:17,19;55:16,17; 61:20;63:1;65:20; 72:7;88:1 <b>monies (13)</b> 10:3;27:6,8;28:15, 17;39:15,19;41:1; 43:21,22,23;44:6; 75:20 <b>more (22)</b> 14:19;15:11,11,12; 22:4,21;26:8;32:18; 44:8;45:6;58:14,14; 63:15,16;68:10; 69:10;73:16;75:6; 82:3;85:12;87:14; 88:10 <b>morning (1)</b> 9:25 <b>mortgage (10)</b> 18:12,16;20:3; 53:18;54:5;55:19; 64:18,21,23;69:3 <b>most (6)</b> 7:1;16:12;21:7; 75:2;83:22;88:21 <b>motion (2)</b> 8:19;22:20 <b>motions (1)</b> 87:10 <b>move (4)</b> 7:15;9:4;46:14,14 <b>moving (4)</b> 14:16;30:12,22; 31:17 <b>Mrs (2)</b> 54:23;62:15 <b>much (10)</b> 21:14;38:19;47:25; 49:2;56:22;64:12; 65:20;67:25;71:2; 76:23 <b>must (7)</b> 7:19;17:1;22:10; 30:4;52:10;81:21; 85:12 <b>myself (2)</b> 46:25;53:18	32:23;78:21 <b>needs (3)</b> 16:7;34:16;88:3 <b>negative (3)</b> 80:5,6,24 <b>negotiated (1)</b> 36:3 <b>negotiating (1)</b> 49:10 <b>negotiation (1)</b> 54:12 <b>negotiations (2)</b> 8:7;36:8 <b>neither (2)</b> 32:3;78:17 <b>net (1)</b> 18:9 <b>New (10)</b> 4:15;5:6,23;9:7; 12:9;14:12;19:20; 22:23;82:11;87:20 <b>next (12)</b> 41:12;42:25;47:24; 49:21;57:17;58:22; 60:14;61:1;74:3; 84:21;87:16;89:23 <b>non (1)</b> 82:14 <b>nonaccepting (1)</b> 85:5 <b>None (1)</b> 28:6 <b>nonparty (2)</b> 22:17;28:12 <b>nonvoting (1)</b> 11:23 <b>nor (1)</b> 78:17 <b>note (8)</b> 7:16;21:10;29:25; 52:14,19;69:4;84:2; 90:2 <b>notes (1)</b> 77:6 <b>notice (1)</b> 51:19 <b>notification (1)</b> 11:23 <b>notified (1)</b> 7:4 <b>notwithstanding (1)</b> 22:2 <b>number (14)</b> 6:25;11:3,4;42:12; 50:25;51:2,5,20; 52:15;54:18;64:24; 65:4,6;81:2 <b>Numbers (7)</b> 6:2;11:2;40:1; 51:3;62:9,14;69:12 <b>NY (4)</b> 4:6,15;5:6,23
<b>M</b>  <b>Madison (3)</b> 81:3;82:1,5 <b>maintenance (1)</b> 82:14 <b>major (1)</b> 43:16 <b>makes (2)</b> 10:18;80:3 <b>making (4)</b> 36:7;68:20;69:7; 86:1 <b>manage (1)</b> 7:21 <b>managed (1)</b> 82:1 <b>management (4)</b> 9:11;13:6,10,14 <b>managerial (2)</b> 13:12,19 <b>managing (2)</b> 10:25;45:11 <b>manner (2)</b> 12:1;85:3 <b>Manville (1)</b> 79:1 <b>many (18)</b> 22:5;29:13;54:9; 64:6,7;66:12,12;72:1,			
			<b>N</b>  <b>name (7)</b> 37:24;38:1;47:13; 48:12;50:17;54:7; 62:12 <b>named (1)</b> 71:12 <b>nature (2)</b> 69:11;76:4 <b>nece (1)</b> 86:18 <b>necessarily (1)</b> 25:17 <b>necessary (4)</b> 19:18;24:24;77:14; 78:13 <b>need (22)</b> 16:9,14,21;25:12; 27:19;28:22;34:25; 47:22;57:25;60:13; 61:7;63:6;70:21; 73:11;86:5,8;87:3,8, 17,20;88:2;90:24 <b>needed (2)</b>

	17:4;26:14;47:3,6; 50:3;55:19;71:25; 91:7,8	34:17;70:22;77:15, 18;80:20;83:12	79:7,10,11,13	<b>penny (1)</b> 71:23
<b>O</b>			<b>paid (34)</b> 23:5,7;24:11,16; 26:7,8,9,9,12;28:5; 30:4;39:20;40:14; 41:1;42:21,22;46:4, 23;47:9;48:18;51:3; 55:16;61:21;64:25; 65:17;71:14,18,20; 72:3,7;75:5,7,9;85:12	<b>People (2)</b> 16:9;89:24
<b>oath (2)</b> 36:25;52:8	<b>offend (1)</b> 59:24	<b>opposed (1)</b> 78:8		<b>per (2)</b> 54:17;62:13
<b>obj (1)</b> 40:9	<b>offer (2)</b> 50:12;77:18	<b>opposes (1)</b> 21:21		<b>percent (3)</b> 39:17,17;42:22
<b>object (2)</b> 41:25;60:3	<b>offered (4)</b> 50:24;56:15;58:25, 25	<b>opposition (5)</b> 21:22;22:22,23; 24:2;54:20		<b>performing (1)</b> 54:11
<b>objected (1)</b> 43:14	<b>Office (7)</b> 9:18;31:21;54:24; 62:15;68:8,9,11	<b>optimist (1)</b> 89:16	<b>paper (2)</b> 26:9;79:20	<b>perhaps (7)</b> 9:24;10:17;16:14; 21:7;35:20;40:13; 88:20
<b>objecting (2)</b> 8:5;42:6	<b>officers (1)</b> 30:7	<b>order (13)</b> 11:19,21,22;12:2; 19:23;28:21;32:21, 22;39:23;46:14; 78:13;86:5,6	<b>paragraph (1)</b> 30:20	<b>permission (2)</b> 44:10,12
<b>objection (52)</b> 8:11,12,19;9:6,7; 11:7;12:8;13:10; 17:22;22:8;23:17; 29:5,7;38:15;39:2; 40:5,9,17;41:3,18,20, 23;44:24;45:1,12,22; 46:5,13,15;47:15,21; 52:2,11,12,22;55:4, 25;56:7,9;57:21,22, 23;59:19;61:15,16; 65:22;66:7;73:4,5,7; 79:9;84:13	<b>OFFICES (1)</b> 4:2	<b>ordered (1)</b> 76:17	<b>part (5)</b> 21:23;37:15;51:6; 55:19;70:12	<b>permitted (1)</b> 73:25
	<b>offset (3)</b> 53:17,18;54:5	<b>orders (1)</b> 16:10	<b>partially (1)</b> 43:14	<b>permitting (1)</b> 41:21
	<b>often (3)</b> 52:16,23;81:2	<b>organized (1)</b> 35:5	<b>participant (1)</b> 19:4	<b>person (5)</b> 26:19,20,20;48:12; 54:7
	<b>okayed (1)</b> 44:12	<b>original (2)</b> 26:5;53:22	<b>particular (4)</b> 15:8;63:12;75:17; 81:19	<b>personal (9)</b> 18:11,17;20:3; 52:7,9;55:21;58:6, 24;69:5
	<b>omitted (1)</b> 22:22	<b>others (1)</b> 27:18	<b>particularly (2)</b> 21:1;80:22	<b>personally (6)</b> 53:10,11,14;62:1; 69:23;70:5
<b>objectionable (1)</b> 38:15	<b>once (5)</b> 23:6;32:13;47:4; 68:8;73:17	<b>Otherwise (3)</b> 19:25;31:20;82:16	<b>parties (15)</b> 6:3;7:22;8:2,3; 11:24;14:1;15:14; 34:8;86:6;87:5,15; 89:1,13,21;90:3	<b>persuaded (2)</b> 30:10;31:16
<b>objections (8)</b> 8:13,21,23;12:4,6; 86:13;87:11,25	<b>one (36)</b> 17:3;21:18;23:1; 24:21;25:7;26:15; 27:7,11,13;29:6; 31:5;48:22;51:18; 53:22;62:10;63:9; 68:9,10,13;69:10; 74:18;75:6,8,12,17; 80:4;81:5,6;84:21, 22;86:12;87:22,24; 88:6;89:2,19	<b>out (4)</b> 21:7;28:5;48:18; 89:2	<b>parties' (1)</b> 81:24	<b>persuasive (1)</b> 83:11
<b>Objection's (1)</b> 74:2		<b>outer (2)</b> 46:16,16	<b>parties-in-interest (1)</b> 82:23	<b>persuasiveness (1)</b> 83:13
<b>objectives (2)</b> 81:12,16		<b>outside (3)</b> 37:16;73:19;88:20	<b>party (3)</b> 7:18;13:16;22:17	<b>ph (4)</b> 26:22;47:13;54:14; 62:1
<b>objector (3)</b> 80:23;83:5,23	<b>ones (3)</b> 20:21;24:9;76:16	<b>over (15)</b> 19:16,16;21:13; 23:22;45:5;46:25; 65:3;67:1,12,17; 77:6;80:20,22;83:16; 91:8	<b>pass (1)</b> 30:1	<b>phone (3)</b> 6:17;17:12;20:15
<b>obligations (1)</b> 88:25	<b>online (1)</b> 19:4	<b>overall (1)</b> 55:20	<b>path (2)</b> 32:8;84:9	<b>phrase (1)</b> 24:20
<b>obstruct (1)</b> 39:23	<b>only (14)</b> 7:14;9:20;22:24; 26:15;27:17;29:6; 32:9;34:8;58:6,10; 61:19;65:1;83:5; 89:19	<b>overrule (6)</b> 41:4;46:13,15; 52:14;61:16;73:6	<b>patience (1)</b> 77:12	<b>phrased (1)</b> 56:23
<b>obstruction (1)</b> 39:24		<b>overruled (9)</b> 9:8;41:20;52:25; 66:3,10;70:4;74:2; 84:14,14	<b>pay (3)</b> 7:21;26:13;53:20	<b>phrases (1)</b> 82:3
<b>obtain (3)</b> 44:13,14,22	<b>open (4)</b> 73:22;77:20;86:13, 19	<b>overruling (1)</b> 40:9	<b>paying (2)</b> 55:19;83:2	<b>physical (2)</b> 69:13,16
<b>obtaining (2)</b> 44:21;45:10	<b>opened (1)</b> 66:1	<b>owed (4)</b> 39:13;40:24;51:1; 72:7	<b>payment (5)</b> 10:4;12:21;31:17, 20;62:11	<b>pick (4)</b> 16:15;18:20;87:17; 90:22
<b>obviously (7)</b> 8:2;39:10,24; 43:11;87:1;88:22; 90:8	<b>operations@escribersnet (1)</b> 5:25	<b>owes (1)</b> 9:22	<b>payments (10)</b> 10:5;12:9,14; 25:14;26:25;28:7; 54:16;55:18;66:21; 85:6	<b>picture (2)</b> 21:23;83:1
<b>occasion (1)</b> 75:16	<b>opinion (6)</b> 59:6,7,8,9,15;62:17	<b>own (3)</b> 7:15;47:4;71:16	<b>PC (1)</b> 4:2	<b>piece (1)</b> 67:22
<b>occasions (1)</b> 68:8	<b>opponents (1)</b> 20:13		<b>penalized (1)</b> 9:3	<b>Pinson (44)</b> 10:24;11:1;13:11, 15;18:4;26:4;30:20; 36:15,18;37:8,25; 38:2,3,23;40:23; 41:24;43:1,11;45:4; 46:2;47:7;48:3;
<b>occurred (1)</b> 19:3	<b>opportunities (1)</b> 74:17	<b>P</b>	<b>pending (2)</b> 8:21;47:21	
<b>occurrences (2)</b> 59:23;61:13	<b>opportunity (6)</b>	<b>page (4)</b>		
<b>o'clock (5)</b> 14:18;15:19;90:17, 23;91:9				
<b>off (9)</b>				

49:10;50:5;53:9,14; 54:10,12;61:20;62:3, 10;64:7,23;66:8,11; 67:18,20;70:8;71:7,8, 11;72:14;75:15; 83:25 <b>P-I-N-S-O-N (1)</b> 38:2 <b>Pinson's (1)</b> 18:11 <b>place (3)</b> 38:11;63:13;68:7 <b>placed (2)</b> 36:25;83:17 <b>plain (2)</b> 80:3;82:6 <b>plainly (1)</b> 84:2 <b>plan (148)</b> 7:6,11;8:11,15; 9:10,12;10:3,5;11:16, 22;12:4,4,7,14,18; 13:4,5,8,13,23;14:2, 15,17,19,21,23,24; 15:1,3,9,13;16:13,14; 17:17,18,23;20:9,19; 22:5,7,10;25:8,17; 27:2;28:22,22,25; 29:1,8,10,15,20; 30:22;31:2,4,6,8,15, 19,19,24,25;32:22, 22;33:12;34:10; 35:16,24;36:1,3,9,9, 12,13,21;37:12,19; 38:10;39:4,7,9,14,15; 40:2,3,8,11,16,20,23; 41:7,9;43:11;45:13, 17;46:6;49:10,11; 50:24;51:5,8,11; 54:3;55:14,21,22; 56:6,25;57:15;58:1, 6;59:25;61:14;62:18, 24;77:24;78:3,12,16, 20,20;80:1,6,7;81:11, 15,15,19,20,21,23; 82:7,8,8,22,22,24; 83:8,16,17;84:4,15, 22;85:1,8,12,13,19 <b>plans (1)</b> 8:7 <b>plausible (1)</b> 43:6 <b>play (1)</b> 18:3 <b>please (23)</b> 10:15;11:10;17:3, 3,6;22:15;35:7,9; 37:24;38:1,4,12; 45:3;47:24;50:11,15, 17,18;53:12;54:19; 61:2;74:3;77:11 <b>pleased (1)</b> 85:19	<b>plug (2)</b> 19:20,20 <b>plumber (1)</b> 74:22 <b>plus (1)</b> 71:21 <b>pm (7)</b> 17:5,5;50:8,8; 77:10,10;91:10 <b>podium (4)</b> 32:16;35:10,13; 38:4 <b>point (16)</b> 7:4;8:8;14:22; 32:6;43:13;44:13; 51:12;53:23;54:12; 63:9;81:14;82:7; 84:10;85:21;89:1,2 <b>points (1)</b> 83:24 <b>portion (1)</b> 19:24 <b>Pose (2)</b> 47:22;59:18 <b>posed (2)</b> 26:4;58:1 <b>posing (1)</b> 44:2 <b>posit (1)</b> 22:1 <b>position (7)</b> 8:22;22:1;24:15; 28:23;36:14;78:11; 81:24 <b>positive (4)</b> 62:20;80:5,5,24 <b>possession (2)</b> 67:18;68:1 <b>possibility (1)</b> 51:5 <b>possible (4)</b> 7:16;21:2;27:21; 83:23 <b>possibly (2)</b> 28:18;75:19 <b>Post (2)</b> 13:5,13 <b>post-confirmation (2)</b> 9:11;13:9 <b>potential (1)</b> 83:7 <b>potentially (2)</b> 15:11,12 <b>practicable (1)</b> 87:9 <b>precise (1)</b> 23:16 <b>prep (1)</b> 34:13 <b>prepare (4)</b> 34:7;51:15;58:14; 60:9 <b>prepared (12)</b>	8:9;10:20,21; 25:19;34:14;35:6; 51:14,20;58:13; 63:18;69:10;88:6 <b>preparing (1)</b> 68:19 <b>pre-petition (1)</b> 82:18 <b>prerogative (1)</b> 7:20 <b>presence (4)</b> 62:1,2;67:19;70:9 <b>present (6)</b> 14:1;26:20,23; 28:6;36:15;78:18 <b>presentation (2)</b> 18:23;37:15 <b>presented (2)</b> 62:7,8 <b>pressure (1)</b> 14:9 <b>presumption (2)</b> 80:15,16 <b>pretty (1)</b> 8:5 <b>previous (1)</b> 67:20 <b>previously (1)</b> 21:9 <b>price (8)</b> 20:2;24:22;38:25; 39:1;42:23;51:19; 65:8,9 <b>principal (10)</b> 10:24,25;20:2; 26:23;28:6;36:5; 41:10;50:13;78:19; 83:10 <b>principle (1)</b> 31:25 <b>prior (6)</b> 9:7;51:19;78:1,7,7, 8 <b>Priority (4)</b> 31:1,3,3;85:11 <b>pro (1)</b> 88:17 <b>Probably (3)</b> 43:8;63:14;87:2 <b>proceed (13)</b> 7:13,23;10:15,21, 21;11:10;22:15; 30:23;35:5,7,9;50:9; 86:15 <b>proceeding (2)</b> 7:9;43:15 <b>proceedings (2)</b> 21:8;91:10 <b>proceeds (1)</b> 18:9 <b>process (10)</b> 13:1;20:21;22:17, 19,25;45:4;69:2;	70:13;83:5;90:19 <b>processes (1)</b> 80:14 <b>produce (1)</b> 27:15 <b>produced (4)</b> 24:14;28:3;76:16, 17 <b>product (1)</b> 58:14 <b>production (2)</b> 22:18;24:3 <b>productive (2)</b> 18:19;85:22 <b>proffer (7)</b> 25:23;33:19,22; 34:1;37:11,16;83:15 <b>proffered (3)</b> 40:3;43:18;62:19 <b>proffering (1)</b> 43:11 <b>profit (1)</b> 71:21 <b>profoundly (1)</b> 89:18 <b>prohibited (4)</b> 33:14;34:11;57:20; 66:11 <b>project (10)</b> 43:23;45:4,5; 48:16;54:11;59:24; 64:4;71:16;72:2,6 <b>promptly (2)</b> 7:16;86:7 <b>proof (1)</b> 61:24 <b>proper (1)</b> 58:11 <b>properly (3)</b> 43:24;53:16;58:9 <b>property (13)</b> 12:17,23;13:21; 14:11,11,13;19:18, 19,21,22;20:20; 43:16;64:19 <b>proponent (3)</b> 15:9;29:20;34:15 <b>proponents (4)</b> 14:6;19:2,7;20:11 <b>proposal (3)</b> 39:6;58:1;82:22 <b>proposals (1)</b> 81:24 <b>propose (4)</b> 24:9;78:17;87:23; 90:17 <b>proposed (48)</b> 8:6;22:6,12;25:10, 18;27:2;31:14;33:12; 34:10;35:16,24; 36:10,13,22;37:19; 39:9,17;40:2,8,11,16, 20;41:7;45:17;49:12;	51:8,9;55:14,20,23; 57:15;61:14;77:24; 78:3,12,15,16,21; 80:1,6,7;82:8,9;83:8, 16;84:4,15;86:5 <b>proposing (5)</b> 36:21;37:12;39:4; 45:12;46:6 <b>pro-rata (1)</b> 12:12 <b>prospect (1)</b> 52:21 <b>prospects (1)</b> 82:17 <b>prove (1)</b> 53:24 <b>proved (1)</b> 82:15 <b>provide (6)</b> 67:9;69:16;70:10; 72:14,18,20 <b>provided (7)</b> 43:22;47:2;69:13; 72:22;76:9,10,15 <b>provides (6)</b> 12:9,20,21;13:1; 31:19,24 <b>provisions (5)</b> 13:24;29:11,15,21, 23 <b>publically (1)</b> 69:4 <b>purpose (1)</b> 31:25 <b>purposes (7)</b> 39:11;52:15;81:12, 13,16;83:19,21 <b>pursuant (3)</b> 10:5;11:19,21 <b>pursue (1)</b> 7:8 <b>put (11)</b> 22:2;23:11;24:6; 34:17;37:9;45:15; 61:2,7;63:6;77:15; 80:23 <b>putting (4)</b> 14:9,19;17:14; 19:22
<b>Q</b>				
				<b>qu (1)</b> 44:2 <b>qua (1)</b> 82:13 <b>quarterly (1)</b> 9:22 <b>question's (2)</b> 47:18;74:2 <b>quickly (1)</b> 46:14 <b>quite (6)</b>

13:13;18:19;29:22; 79:22;80:21;87:12 <b>quote (2)</b> 78:24;81:17 <b>quoting (1)</b> 79:7	66:20;69:21;70:17; 85:7,13 <b>received (27)</b> 8:13;11:11,13; 12:6;23:23;24:10,16; 28:20;33:20;39:1,19; 41:14;54:15,18,20, 22,23;62:14;64:7; 65:4,6,20;66:22; 68:25;69:3,20;70:16 <b>receives (2)</b> 18:8;85:6 <b>receiving (2)</b> 49:3;69:9 <b>recent (1)</b> 16:12 <b>recently (5)</b> 22:24;29:22;54:16, 18,19 <b>Recess (3)</b> 17:5;50:8;77:10 <b>recollect (1)</b> 75:2 <b>recollection (13)</b> 51:17;58:16;60:11; 74:8,9,11,19;75:3,15, 23;76:3,7,7 <b>record (42)</b> 14:2;17:4,14; 20:10;21:10,22; 29:12,17,23;30:6,9, 19;33:20;34:16;35:1; 36:7,19,24;37:17,24; 50:4,17;52:19;57:4; 77:14,15,17,18; 79:20;80:17,18,21, 23;83:1,2;84:6,7,12; 85:16;86:2;91:7,8 <b>recross (4)</b> 49:15;70:19,22,24 <b>RECROSS-EXAMINATION (1)</b> 72:12 <b>redirect (6)</b> 48:6;49:7,8;68:16, 17;71:9 <b>reduce (1)</b> 18:15 <b>reference (1)</b> 79:12 <b>referenced (3)</b> 66:23;67:10;81:2 <b>referral (1)</b> 87:24 <b>referring (9)</b> 11:2;42:9,11,23; 65:7,8;74:14;76:2; 78:23 <b>reflect (3)</b> 46:3,23;54:16 <b>reflected (5)</b> 25:15;28:7;47:9; 48:19;85:16 <b>reflecting (2)</b>	11:25;54:18 <b>refocus (1)</b> 40:10 <b>reframe (3)</b> 40:18;45:3;55:11 <b>regard (10)</b> 9:21;10:10,11; 35:20,21;43:22;76:4, 14,14;84:23 <b>regarding (4)</b> 6:3;37:13;74:12; 78:1 <b>registration (1)</b> 32:1 <b>regulatory (2)</b> 30:12,16 <b>reject (1)</b> 12:4 <b>rejected (3)</b> 13:5;30:24;70:7 <b>relate (2)</b> 86:20,25 <b>relates (2)</b> 23:20;44:25 <b>relation (1)</b> 46:6 <b>release (4)</b> 18:11,16;20:2;47:3 <b>relevance (1)</b> 44:24 <b>Relevancy (3)</b> 39:4;41:6;65:23 <b>relevant (5)</b> 41:6;45:12;46:17; 55:14;78:2 <b>reliance (1)</b> 11:7 <b>reluctant (1)</b> 89:18 <b>rely (2)</b> 11:5;26:21 <b>relying (1)</b> 40:2 <b>remain (1)</b> 86:19 <b>remaining (1)</b> 87:14 <b>remediation (2)</b> 19:18,25 <b>remedies (1)</b> 7:8 <b>Remember (12)</b> 44:2;45:14;53:19; 62:12;63:17;64:3,10, 24;68:6,10;74:24; 75:10 <b>remind (2)</b> 52:10;79:8 <b>reminded (1)</b> 82:5 <b>reminder (1)</b> 86:21 <b>removed (1)</b>	18:4 <b>renovations (1)</b> 15:6 <b>reorganization (6)</b> 31:14;49:11;55:14, 21;56:6;82:17 <b>reorganized (1)</b> 30:8 <b>repair (1)</b> 12:23 <b>repairs (1)</b> 42:17 <b>repeat (2)</b> 35:1;46:19 <b>rephrase (5)</b> 44:13;45:3;56:1; 57:12;75:21 <b>reply (1)</b> 79:16 <b>replying (1)</b> 67:7 <b>report (1)</b> 14:13 <b>reported (3)</b> 39:12,13,23 <b>reporting (2)</b> 39:11,23 <b>representative (2)</b> 7:5;65:15 <b>representing (2)</b> 6:14,18 <b>request (6)</b> 11:4;14:2;23:15; 24:3;28:13;70:17 <b>requested (1)</b> 22:17 <b>requests (2)</b> 9:22;23:21 <b>required (3)</b> 10:5;29:19;52:6 <b>requirement (7)</b> 79:25;80:5,7,25; 81:18;84:3;85:15 <b>requirements (10)</b> 13:24;29:23;32:2, 10;80:4;84:18,19; 85:17,18;88:24 <b>requires (2)</b> 17:19;31:12 <b>requiring (1)</b> 85:11 <b>residence (3)</b> 18:12,17;20:3 <b>residents (2)</b> 12:25;21:8 <b>resolution (3)</b> 8:3;17:13;19:23 <b>resolve (1)</b> 89:22 <b>resolved (1)</b> 90:7 <b>respect (50)</b> 7:21;8:11,19;9:11,	12;10;2;12:15,18; 13:3,9,15,16,19; 14:12;17:23;18:16, 23;20:20;22:9;24:7; 28:20;29:25;30:7; 32:4,6;34:1;35:11,14, 17;36:8,21;45:21; 56:10;71:11;73:19; 77:19,25;78:2;79:24; 80:10,22,24;82:23; 83:4;84:3,9,13;85:9; 86:14;89:17 <b>Respectfully (1)</b> 63:24 <b>respond (1)</b> 65:24 <b>response (10)</b> 8:12;11:10;23:23; 24:5,10;67:12;69:20; 70:16,17;79:18 <b>responses (1)</b> 22:20 <b>responsive (1)</b> 23:24 <b>rest (1)</b> 77:1 <b>restate (2)</b> 21:20;44:5 <b>result (9)</b> 12:24;14:13;15:13; 19:21;20:7;81:12,15, 20;88:15 <b>resurrect (1)</b> 8:8 <b>retain (1)</b> 85:13 <b>retiree (1)</b> 31:22 <b>return (1)</b> 69:2 <b>review (3)</b> 10:19;21:22;82:18 <b>revisions (1)</b> 20:9 <b>RICHARD (3)</b> 5:8;6:17;16:22 <b>rid (1)</b> 19:23 <b>right (73)</b> 6:5,10,13,22;9:13; 10:8,15,17;14:5;16:1, 10,11,17;17:8;18:18, 18;19:3,3,4,6;20:7, 11,13;21:5,13;22:15; 23:9;25:2;29:2;34:2, 14;35:2,10;36:15; 37:5,8,12,17,22; 42:25;45:25;49:5,15, 20,25;50:14,20; 58:22;63:4;68:16; 70:19,25;71:8;75:14; 76:21,24;77:5;78:6, 10;79:4,14,16,18;
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87:10,11,21;89:16; 90:5,6,10;91:5,5,7 <b>rightful (1)</b> 44:7 <b>rights (2)</b> 85:2,4 <b>rigid (1)</b> 90:24 <b>rigidity (1)</b> 82:16 <b>rise (2)</b> 50:7;77:9 <b>road (1)</b> 21:25 <b>Robinson (1)</b> 6:7 <b>role (3)</b> 8:5;13:12;16:14 <b>roll (1)</b> 91:8 <b>rope (1)</b> 41:23 <b>row (2)</b> 73:8;84:9 <b>rule (4)</b> 38:17;52:15;59:21; 85:11 <b>rules (1)</b> 54:5 <b>ruling (3)</b> 79:24;85:22,24 <b>run (1)</b> 29:7	24:17;43:1;44:8; 54:21;56:14;57:3 <b>scenario (2)</b> 87:2;88:19 <b>scenarios (2)</b> 8:6;35:25 <b>schedule (4)</b> 87:9;88:20,24; 89:23 <b>scheduled (2)</b> 12:5;87:16 <b>scheduling (4)</b> 11:22;90:1,2;91:7 <b>SCHWARTZ (87)</b> 6:6,6,24;7:3,24; 8:2;9:24;10:1,22; 11:15;12:9;13:7,14; 17:10,16;18:1,8,14, 22,25;19:11;22:22; 23:22;34:3,12,14; 35:6,8,11,14,19;36:8, 17;39:2,4;41:3,6,18; 44:24;45:12;46:5,8; 47:15;49:9,14;52:2; 55:4,25;56:7,10; 57:22;60:3;61:15; 64:15,17;66:1;68:13, 15,20;70:2,24;71:7, 10;72:9;73:4,22; 76:22;77:2,22;78:9; 79:17;86:10,12,17, 19,24;87:6,8,18,20; 88:9,13,17,19;89:4, 14;90:4 <b>Schwartz's (2)</b> 54:24;62:15 <b>scope (4)</b> 37:11,16;41:21; 73:19 <b>SDF (2)</b> 18:8;31:7 <b>SDF17 (5)</b> 4:12;6:12;11:17; 12:14;18:1 <b>searching (1)</b> 83:22 <b>seat (1)</b> 84:9 <b>seated (3)</b> 17:6;50:11;77:11 <b>second (14)</b> 7:14,14;11:20; 28:8;36:12;62:2,3; 75:12;78:14,24;79:7; 81:3,8;83:25 <b>section (19)</b> 17:23;29:9,10; 30:1,18;31:11,18; 32:2;35:14;37:18; 80:1,3,4;81:9,14,18; 82:21;84:13,19 <b>Sections (1)</b> 13:25	<b>secured (27)</b> 6:12;7:5;10:2,6; 11:17;12:10,14,22; 14:7;17:17,24;18:1; 19:11,25;20:8;22:3; 28:10;31:8;36:2,3; 40:24;43:12,12;44:1; 51:1;62:21,22 <b>Securities (1)</b> 32:2 <b>seeing (1)</b> 55:20 <b>seeking (3)</b> 28:13,14,21 <b>seeks (1)</b> 56:23 <b>seem (2)</b> 7:19;31:22 <b>seems (7)</b> 19:20;20:5;34:17; 55:10;56:1;70:3;88:3 <b>selling (1)</b> 65:4 <b>sense (7)</b> 10:18;29:2,4;42:7; 88:1,5,21 <b>sensible (1)</b> 20:5 <b>sent (4)</b> 23:14,15,22;69:17 <b>separate (4)</b> 35:25;49:1,53;21; 71:17 <b>separately (1)</b> 80:9 <b>serve (1)</b> 88:7 <b>served (3)</b> 11:22;67:4;80:11 <b>serves (1)</b> 52:15 <b>service (2)</b> 11:24,25 <b>set (17)</b> 7:18;9:1,6;11:15, 18;12:2;13:4,10,22; 30:9,20;32:8;40:6; 53:21,22,24;88:5 <b>sets (1)</b> 39:15 <b>settlement (1)</b> 8:7 <b>seven (1)</b> 65:3 <b>seventh (1)</b> 73:7 <b>seventy (1)</b> 39:16 <b>several (5)</b> 8:14;27:17;32:23; 36:10;38:11 <b>Shall (2)</b> 18:20;89:12	<b>Shapiro (3)</b> 62:3;67:20;70:9 <b>Shapiro's (1)</b> 68:11 <b>Sheepshead (2)</b> 5:3;6:18 <b>sheet (3)</b> 24:22,22;26:6 <b>SHORE (15)</b> 5:2,8;6:17,17,18; 16:20,22,22,25;17:2; 19:5;20:14,16,18; 21:12 <b>short (1)</b> 50:3 <b>show (1)</b> 69:5 <b>showed (5)</b> 54:13,14;61:25; 67:22,24 <b>shows (1)</b> 27:7 <b>sic (3)</b> 58:10,14;62:25 <b>side (1)</b> 32:8 <b>sides (1)</b> 20:6 <b>sign (2)</b> 47:3;71:25 <b>signed (2)</b> 47:6;64:22 <b>significant (3)</b> 14:12;19:17;79:23 <b>simply (3)</b> 13:19;44:19;52:16 <b>sincere (1)</b> 89:22 <b>sine (1)</b> 82:13 <b>single (1)</b> 67:21 <b>siphoned (4)</b> 27:7,8;39:10,21 <b>site (1)</b> 54:9 <b>situation (2)</b> 14:10;89:20 <b>six (1)</b> 65:3 <b>slavish (1)</b> 82:18 <b>slightly (1)</b> 76:12 <b>small (1)</b> 42:14 <b>sold (2)</b> 65:9,9 <b>sole (1)</b> 79:24 <b>solicitation (1)</b> 17:20 <b>somebody (1)</b>	62:5 <b>sometimes (4)</b> 31:10;42:15,17; 75:8 <b>somewhat (3)</b> 8:20;74:13;88:23 <b>soon (1)</b> 87:9 <b>sorry (17)</b> 19:16;34:3;42:2; 46:20;53:23;54:20; 57:2;59:2,2,62:17; 64:3,10;68:4,11; 69:2;73:25;75:21 <b>sought (1)</b> 36:2 <b>sound (1)</b> 16:19 <b>sounds (2)</b> 18:19;40:13 <b>source (1)</b> 81:2 <b>Southern (1)</b> 82:11 <b>speak (4)</b> 10:12;15:19;32:15; 56:22 <b>specific (11)</b> 42:15;46:12;69:7; 71:19;74:5,18,23; 75:8;76:6,14;87:13 <b>specifically (3)</b> 22:8;70:8;72:16 <b>specifics (1)</b> 75:10 <b>specify (1)</b> 15:20 <b>speech (1)</b> 14:25 <b>spell (2)</b> 38:1;50:18 <b>spend (2)</b> 53:18;88:1 <b>spent (1)</b> 44:10 <b>spoke (3)</b> 14:25;22:22;72:1 <b>stand (4)</b> 17:3;34:7;37:9; 49:11 <b>standard (3)</b> 51:9;78:14;81:1 <b>standpoint (1)</b> 90:3 <b>stands (1)</b> 14:20 <b>started (1)</b> 22:17 <b>state (8)</b> 7:9;37:24;43:15; 48:9;50:17;56:9; 59:4;74:1 <b>stated (2)</b>
<b>S</b>				
<b>sake (1)</b> 57:3 <b>sale (5)</b> 12:17;15:6,6;18:9; 25:15 <b>sales (3)</b> 13:16,20;28:9 <b>same (5)</b> 37:3;60:9;68:10; 73:8;75:10 <b>Sandy (2)</b> 12:24;19:19 <b>satisfied (20)</b> 29:12,21;30:5,6,11, 13,18,23;31:1,6; 33:19;83:7,11,23; 84:12,20,24;85:7,14, 17 <b>satisfy (2)</b> 22:9;86:6 <b>satisfying (1)</b> 15:15 <b>saved (1)</b> 19:24 <b>saw (3)</b> 49:2;68:5;70:7 <b>saying (6)</b>				

19:9;20:9 <b>statement (21)</b> 9:8,9;11:21,21,22; 12:2;13:18;24:13; 26:7,12,19;36:11,12; 47:1,8,19;48:24; 53:16;54:18;62:13; 72:19 <b>statements (45)</b> 9:10;27:16,16; 28:2,7;29:12;36:6; 40:1,3;46:3,22;48:20, 21;54:13,14,15,16, 22;55:3;61:25;62:7, 10,14;67:14,15,23, 24,25;68:5;69:22,24; 70:1,6,12;72:14,25; 73:3;75:23;76:1,3,9, 9,15;81:6;83:14 <b>statement's (1)</b> 30:21 <b>States (6)</b> 6:15;9:18;10:6; 31:18,21;81:25 <b>stating (1)</b> 25:5 <b>status (9)</b> 9:14,15,15,21; 10:12,13;11:23; 30:24;86:9 <b>statutory (1)</b> 85:17 <b>stay (3)</b> 7:10;27:5;63:6 <b>Staying (1)</b> 9:13 <b>still (4)</b> 14:23;23:24;68:2; 72:7 <b>Street (1)</b> 5:22 <b>strictly (1)</b> 66:11 <b>structure (1)</b> 48:17 <b>subject (10)</b> 16:11,14;20:1,9; 30:5,9,15;32:6;40:7; 57:13 <b>subjects (1)</b> 37:1 <b>submission (1)</b> 12:3 <b>submit (4)</b> 12:19;24:2;78:3; 86:4 <b>submits (2)</b> 13:23;77:24 <b>submitted (1)</b> 67:2 <b>substance (3)</b> 21:6;36:4;73:16 <b>substantial (1)</b>	12:21 <b>substantially (1)</b> 73:8 <b>substantive (1)</b> 82:2 <b>subtracted (1)</b> 65:12 <b>success (1)</b> 31:16 <b>suffered (1)</b> 12:23 <b>sufficient (1)</b> 40:7 <b>suggest (4)</b> 7:18;9:5;84:1; 90:11 <b>Suite (2)</b> 4:14;5:22 <b>sum (1)</b> 77:19 <b>summarize (1)</b> 61:5 <b>summary (1)</b> 21:11 <b>supplement (1)</b> 80:8 <b>support (9)</b> 7:8;8:16;10:3; 11:6;20:18;21:2,8, 22;77:23 <b>supports (3)</b> 16:13;20:8,18 <b>suppose (4)</b> 7:15;15:17;33:18, 20 <b>supposed (6)</b> 9:3;39:20;54:4,5; 62:23;69:17 <b>supposedly (1)</b> 26:6 <b>sure (16)</b> 16:16;23:2;31:20; 32:17;42:8;63:7; 64:20;65:1;66:25; 67:6,8;68:11;69:14; 73:1;85:23;86:1 <b>surrounding (1)</b> 81:22 <b>survive (1)</b> 15:4 <b>suspect (1)</b> 86:8 <b>suspicion (1)</b> 55:6 <b>suspicious (1)</b> 55:3 <b>sustain (4)</b> 40:5;45:1,22;57:23 <b>sustained (2)</b> 40:17;55:5 <b>sustaining (1)</b> 40:9 <b>swear (3)</b>	36:24;37:22;50:14 <b>sworn (2)</b> 37:23;50:16  <b>T</b>  <b>table (4)</b> 23:4;24:18;39:22; 61:21 <b>talk (1)</b> 64:8 <b>talked (1)</b> 61:19 <b>talking (3)</b> 26:23;42:12;58:10 <b>tax (3)</b> 10:6;12:10;39:23 <b>taxes (3)</b> 31:23;32:1;42:9 <b>telephone (1)</b> 6:4 <b>telephonic (1)</b> 19:3 <b>TELEPHONICALLY (1)</b> 5:8 <b>tells (1)</b> 80:11 <b>tens (1)</b> 43:3 <b>term (3)</b> 30:16;81:8,10 <b>terms (1)</b> 36:3 <b>terrible (2)</b> 91:6,7 <b>terribly (1)</b> 90:25 <b>test (8)</b> 15:15;19:2;25:7; 30:17;32:7;58:25; 78:14,15 <b>testified (4)</b> 58:23;61:5;65:14; 69:22 <b>testify (11)</b> 24:25;25:20;26:19; 36:5,25;52:6,10; 56:10;58:20;59:14; 68:2 <b>testifying (1)</b> 52:22 <b>testimony (25)</b> 25:23,24;26:3; 36:6,25;37:3;51:14; 52:16;53:1;56:24; 57:14;58:13,25;59:2; 60:10,20;64:11; 66:23;69:8;74:25; 75:20;77:25;79:21; 83:10,15 <b>Thanks (2)</b> 50:6;77:7 <b>therefore (5)</b>	14:18;15:4;39:13; 78:19,20 <b>therein (1)</b> 51:12 <b>there'll (1)</b> 15:10 <b>thereof (2)</b> 14:13;19:21 <b>Third (1)</b> 17:7 <b>thirty (5)</b> 50:25;51:1;55:17; 62:23;65:13 <b>thirty-million-dollar (1)</b> 58:8 <b>thirty-million-dollars (1)</b> 62:21 <b>thirty-one (1)</b> 62:23 <b>thirty-three (3)</b> 28:11;43:13;44:11 <b>thorough (2)</b> 79:21;83:22 <b>thoroughly (2)</b> 73:11;79:23 <b>though (4)</b> 42:22;81:8;82:21; 91:6 <b>thousands (4)</b> 43:3,3,4,7 <b>three (4)</b> 52:1;63:15,17;75:9 <b>threshold (1)</b> 18:15 <b>thresholds (1)</b> 12:17 <b>Thus (1)</b> 81:13 <b>tie (1)</b> 57:25 <b>timely (5)</b> 8:23,23;12:1,5; 37:17 <b>times (8)</b> 36:10;42:19;44:22; 54:9;66:12;67:19; 72:1,1 <b>timing (1)</b> 88:10 <b>title (4)</b> 24:21;29:11,15,21 <b>today (25)</b> 7:6,12,13;9:23; 10:21;11:1;12:5; 14:11,18;15:22; 17:18;22:6,7,22; 27:24;28:22;36:13; 58:10,17,23;74:6; 75:24;79:21;84:11; 87:18 <b>today's (1)</b> 6:25 <b>together (2)</b>	23:22;80:9 <b>told (5)</b> 26:8,13;60:12; 62:12;70:8 <b>tonight (1)</b> 86:6 <b>took (3)</b> 38:11;61:20;68:7 <b>total (2)</b> 65:4,6 <b>totality (1)</b> 81:22 <b>touch (1)</b> 67:23 <b>transaction (1)</b> 63:12 <b>Transcribed (1)</b> 5:20 <b>transfer (2)</b> 43:16,19 <b>transpired (2)</b> 32:23;35:22 <b>treated (3)</b> 31:2,4;85:3 <b>treatise (2)</b> 80:11;81:25 <b>treatment (2)</b> 17:24;85:4 <b>tremendous (1)</b> 74:22 <b>tried (1)</b> 66:12 <b>trouble (1)</b> 66:12 <b>true (1)</b> 24:23 <b>trust (2)</b> 16:16;86:5 <b>Trustee (8)</b> 6:15;9:19;10:1,6; 12:11;18:25;31:18, 21 <b>truth (2)</b> 26:21;37:1 <b>try (3)</b> 8:3;45:2;88:7 <b>trying (4)</b> 9:3;58:3;61:4;69:5 <b>turn (3)</b> 10:18;82:10;83:1 <b>turned (4)</b> 17:11;67:1,12,17 <b>turns (2)</b> 85:10;89:2 <b>twenty (3)</b> 28:10;65:5,10 <b>twenty-five (3)</b> 45:6;64:24;65:12 <b>twenty-four (1)</b> 19:16 <b>twenty-three-and-a-half (1)</b> 18:10 <b>twenty-two (1)</b>
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18:9 <b>two (14)</b> 34:7;35:5;58:9; 60:1;63:16,19,20,21, 25;64:1;67:19;75:9; 77:6;80:4 <b>types (1)</b> 30:15 <b>typically (1)</b> 52:12	10:4,7;11:18; 12:11,13,16;13:2; 15:16;31:9;40:24; 51:6;62:25 <b>up (11)</b> 6:5;18:14,20;38:4; 66:1,2;74:22;77:19; 86:7;88:15;90:10 <b>upon (4)</b> 11:7;12:16;14:2; 71:21 <b>upset (1)</b> 80:16 <b>urgency (1)</b> 7:13 <b>urgent (1)</b> 7:3 <b>usage (1)</b> 44:7 <b>use (1)</b> 24:20 <b>used (3)</b> 39:19;81:9;82:2 <b>usurping (2)</b> 7:20;14:9	<b>vote (3)</b> 8:14;12:3;84:23 <b>votes (3)</b> 12:7;84:22,22 <b>voting (3)</b> 8:14;28:24;32:22	<b>wishes (1)</b> 16:8 <b>withdraw (3)</b> 7:7,7;55:12 <b>within (1)</b> 81:4 <b>without (7)</b> 7:5;20:24;43:18, 20;44:9;51:19;84:23 <b>witness (72)</b> 24:7;25:24,25; 32:12,24;33:1;34:20; 37:4,9,22,23,25;38:2, 13;41:22,25;42:2,3,5, 7;46:19;48:8;49:6, 21,23;50:6,12,15,16, 19;52:5,9,20,22;53:1, 3,13;55:5;56:8,10,13, 21;57:6,7;58:19,21; 59:14;60:7,15,19,21, 24;61:1,3,8;62:4; 63:5,7,14,17,21,25; 64:3,6,10,13;70:23; 71:1,3,6;73:20;83:25 <b>witness' (1)</b> 56:24 <b>witnesses (6)</b> 24:9;25:19;59:10, 11;71:4;76:25 <b>words (1)</b> 82:3 <b>work (9)</b> 54:11;67:7;74:18, 20,23;89:17;90:6,8; 91:7 <b>working (1)</b> 8:3 <b>working-class (1)</b> 20:22 <b>wrote (1)</b> 14:25	<b>Z</b>  <b>zone (1)</b> 15:20  <b>1</b>  <b>1,300 (1)</b> 9:22 <b>100,000 (1)</b> 13:2 <b>100,000-dollar (1)</b> 12:11 <b>10017 (2)</b> 4:15;5:6 <b>10040 (1)</b> 5:23 <b>101 (1)</b> 6:2 <b>106 (1)</b> 6:2 <b>108 (1)</b> 11:3 <b>109 (1)</b> 11:4 <b>11 (5)</b> 25:17;29:11,15,21; 82:14 <b>1120 (1)</b> 31:23 <b>1122 (1)</b> 13:25 <b>1123 (1)</b> 13:25 <b>11235 (1)</b> 4:6 <b>1129 (2)</b> 13:25;29:9 <b>1129a (1)</b> 84:19 <b>1129a1 (1)</b> 29:10 <b>1129a10 (1)</b> 31:5 <b>1129a11 (1)</b> 31:11 <b>1129a12 (1)</b> 31:18 <b>1129a13 (1)</b> 31:22 <b>1129a2is (1)</b> 29:19 <b>1129a3 (12)</b> 22:9;30:1;35:15; 37:19;78:3;80:1,4; 81:9,14,18;82:21; 84:13 <b>1129a3requires (1)</b> 81:7 <b>1129a4 (1)</b> 30:2 <b>1129a5 (1)</b>
<b>U</b>		<b>W</b>		
<b>Um-hum (4)</b> 17:25;48:7;67:16; 69:18 <b>unavailable (1)</b> 89:6 <b>uncontested (2)</b> 29:14,25 <b>under (16)</b> 23:3;24:18;29:3,9, 19;30:24;36:25; 37:18;39:9,22;52:8; 57:20;61:21;81:14; 82:20;85:13 <b>underlies (1)</b> 80:13 <b>undermine (2)</b> 83:12,24 <b>Understood (4)</b> 16:9;20:24;86:17; 88:18 <b>undertaken (1)</b> 80:16 <b>unduly (1)</b> 35:1 <b>unfairly (1)</b> 85:2 <b>Unfortunately (2)</b> 51:14;58:13 <b>unit (6)</b> 41:2;42:16;47:3; 74:20,21;75:1 <b>United (4)</b> 6:14;9:18;10:6; 31:18 <b>Unites (1)</b> 31:21 <b>units (8)</b> 12:17;15:6,7;21:3; 38:24,24;41:14,16 <b>unlawful (1)</b> 58:7 <b>unless (1)</b> 31:14 <b>unnecessary (2)</b> 34:25;82:16 <b>unrelated (1)</b> 8:20 <b>unreliable (1)</b> 52:16 <b>unsecured (12)</b>	<b>V</b>  <b>vacation (1)</b> 91:4 <b>validity (1)</b> 22:4 <b>value (1)</b> 83:21 <b>vari (1)</b> 42:18 <b>variance (1)</b> 38:25 <b>variances (1)</b> 43:2 <b>variation (1)</b> 42:20 <b>variations (2)</b> 42:14;43:1 <b>varied (1)</b> 43:5 <b>various (7)</b> 8:5,6;35:22;42:8, 19;66:2;75:7 <b>verb (1)</b> 16:15 <b>verbatim (1)</b> 82:3 <b>view (3)</b> 27:23;81:6;86:16 <b>viewed (1)</b> 81:21 <b>virtually (1)</b> 51:6 <b>vision (1)</b> 68:3 <b>voice (1)</b> 34:5	<b>wait (1)</b> 60:14 <b>wants (1)</b> 60:17 <b>warrant (1)</b> 29:18 <b>waterfall (1)</b> 12:15 <b>way (11)</b> 7:16;15:24;32:18; 58:16;59:9,13;82:4; 83:13,13;88:19;90:5 <b>ways (1)</b> 81:2 <b>wee (1)</b> 91:2 <b>weeks (3)</b> 88:24;89:24;90:25 <b>weight (1)</b> 52:24 <b>weren't (1)</b> 75:8 <b>West (1)</b> 5:22 <b>what's (2)</b> 19:8;23:3 <b>whenever (1)</b> 88:3 <b>Whereupon (1)</b> 91:10 <b>whole (1)</b> 51:4 <b>who's (4)</b> 8:4,4;32:24;33:1 <b>whose (2)</b> 85:4;88:14 <b>wide (2)</b> 83:4,6 <b>widely (1)</b> 81:4 <b>Wilk (8)</b> 51:25;53:5;72:15; 74:12;75:4,5,18; 86:14 <b>Wilk's (1)</b> 68:8 <b>willing (2)</b> 48:16;71:17 <b>wise (1)</b> 85:23 <b>wish (1)</b> 48:21 <b>wished (1)</b> 80:23	<b>Y</b>  <b>Yachad (1)</b> 10:25 <b>yardstick (1)</b> 81:7 <b>year (2)</b> 20:23;91:6 <b>years (12)</b> 63:15,16,19,20,21, 25;64:1,4;65:3,4; 68:9;72:8 <b>yesterday (1)</b> 14:11 <b>yield (1)</b> 35:10 <b>York (5)</b> 4:15;5:6,23;12:10; 82:11	

30:10	11:16;18:1;79:13			
<b>1129a6 (1)</b>	<b>3:30 (2)</b>	<b>9</b>		
30:12	7:4;15:1			
<b>1129a7 (1)</b>	<b>300 (1)</b>	<b>9 (4)</b>		
30:18	26:8	90:17,23,23;91:9		
<b>1129a8 (1)</b>	<b>300,000 (4)</b>	<b>900,000 (2)</b>		
30:22	51:20;53:6,15;54:1	24:23;53:23		
<b>1129a9 (1)</b>	<b>33 (1)</b>	<b>973406-2250 (1)</b>		
31:1	30:20	5:24		
<b>1129b (1)</b>	<b>360 (2)</b>			
32:5	4:13;5:4			
<b>1129d (1)</b>				
31:24	<b>4</b>			
<b>1200 (1)</b>				
4:14	<b>4 (2)</b>			
<b>125,000 (2)</b>	11:17;31:9			
54:17;62:13	<b>415 (1)</b>			
<b>13th (1)</b>	4:4			
11:19				
<b>14th (1)</b>	<b>5</b>			
5:5				
<b>15th (2)</b>	<b>5 (5)</b>			
89:9;91:1	13:3;14:17;15:19;			
<b>16th (1)</b>	30:24;32:2			
89:6	<b>5.1 (1)</b>			
<b>192nd (1)</b>	17:23			
5:22	<b>5:10 (1)</b>			
<b>1933 (1)</b>	17:5			
32:2				
<b>1981 (1)</b>	<b>6</b>			
82:11				
<b>1988 (1)</b>	<b>6- (1)</b>			
79:5	66:4			
<b>1st (5)</b>	<b>6:37 (1)</b>			
90:11,13,14,15,22	17:5			
	<b>636 (1)</b>			
<b>2</b>	79:3			
	<b>649 (1)</b>			
	79:3			
<b>2004 (1)</b>				
22:17	<b>7</b>			
<b>2005 (1)</b>				
64:23				
<b>2011 (1)</b>	<b>7:18 (1)</b>			
64:2	50:8			
<b>2013 (2)</b>	<b>7:43 (1)</b>			
11:19;12:2	50:8			
<b>20th (2)</b>	<b>7:52 (1)</b>			
8:12;12:2	57:4			
<b>22nd (1)</b>	<b>700 (1)</b>			
89:7	5:22			
<b>23rd (2)</b>				
89:10,11	<b>8</b>			
<b>240,000 (1)</b>				
18:14	<b>8:19 (1)</b>			
<b>24th (2)</b>	77:10			
8:17;89:12	<b>8:35 (1)</b>			
<b>2nd (7)</b>	77:10			
4:5;79:5;90:11,12,	<b>8:55 (1)</b>			
16,17,20	91:10			
	<b>800,000 (1)</b>			
<b>3</b>	66:4			
	<b>843 (1)</b>			
<b>3 (3)</b>	79:3			